93-1091

FILED
JAN 4 1994
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF SOUTH DAKOTA, BY AND THROUGH THE DEPARTMENT OF SOCIAL SERVICES EX REL. GAIL A. DOTSON, IN HER OWN BEHALF AND ON BEHALF OF JARED DOTSON, A MINOR CHILD,

Petitioner,

v.

MERYL D. SERR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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QUESTION PRESENTED

WHETHER A TWO-YEAR STATUTE OF LIMITATIONS ON PATERNITY ACTIONS MAY BE APPLIED TO SHIELD A PUTATIVE FATHER FROM SUIT, CONSISTENT WITH THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION?

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v.

MERYL D. SERR,

Respondent.

The Petitioner, State of South Dakota, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of South Dakota entered in the above-entitled proceeding on October 6, 1993.

OPINIONS BELOW

The opinion of the South Dakota Supreme Court was delivered on October 6, 1993; it

appears at 506 N.W.2d 421 (S.D. 1993) and is printed in the Appendix at A-2. The Findings of Fact and Conclusions of Law of the circuit court relating to the statute of limitations defense are set out at Appendix A-21, and the accompanying Order Denying Motion to Dismiss is set out at Appendix A-29. Findings of Fact and Conclusions of Law on the merits are set out at Appendix A-32 and the Judgment of Paternity and Support is set out at Appendix A-43. Additional Findings of Fact and Conclusions of Law were thereafter entered, Appendix A-46, and an Amended Judgment of Paternity and Support was entered on the same day. Appendix A-54. A Second Amended Judgment of Paternity and Support was subsequently entered. Appendix A-58.

JURISDICTIONAL STATEMENT

The opinion of the South Dakota Supreme Court was rendered on October 6, 1993. State v. Serr, 506 N.W.2d 421 (S.D. 1993); Appendix

at A-2. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, art. XIV, § 1 states:

> No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statute at issue here, SDCL 25-8-9, as originally enacted in 1939 (SDC 1939 § 37.2131) and as effective in 1978 states[1]:

> Proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in

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[1]A two-year statute of limitations on enforcing the child support obligation was enacted in 1923 (SL 1923, ch. 295, § 32) and was amended in 1931 (SL 1931, ch. 263) to provide that the time spent by the putative father outside the state would not be included in the computation. The 1939 version referred to above did not include the language which had been added in 1931.

> writing or by the furnishing of support.

SDCL 25-8-9, as revised in 1983 (1983 S.D. Sess. L. ch. 207, § 2) states:

> Proceedings to enforce the obligation of the father may not be brought after the lapse of more than six years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support.

SDCL 25-8-9, as revised in 1986 (1986 S.D. Sess. L. ch. 218, § 57) states:

> Proceedings to establish paternity and enforce the obligation of the father may be brought at any time prior to the eighteenth birthday of the child. The provisions of this section apply to all children who have been born since July 1, 1968.

SDCL 25-8-9, as revised in 1989 (1989 S.D. Sess. L. ch. 222) states:

> Proceedings to establish paternity and enforce the obligation of the father may be brought at any time before the eighteenth birthday of the child.

STATEMENT OF THE CASE

In this case, the State of South Dakota, on behalf of a minor child, seeks review of the determination of the Supreme Court of the State of South Dakota that a two-year statute of limitations in effect in 1978 could bar a paternity action against a putative father brought slightly less than thirteen years after the birth of the child.

The relevant facts are as follows. On June 6, 1978, Gail Dotson gave birth to a son, Jared Dotson, in Pennsylvania. State v. Serr, 506 N.W.2d at 422; Appendix A-3. The putative father, Respondent Meryl D. Serr, had no contact with Ms. Dotson or the child until 1988 or 1989 when Ms. Dotson made contact with Mr. Serr by way of a letter and photograph of Jared Dotson. State v. Serr, 506 N.W.2d at 422; Appendix A-3. In December of 1989, Ms. Dotson began to receive Aid to Dependant Children in Pennsylvania and applied for child

support services under Pennsylvania's Revised Uniform Reciprocal Enforcement of Support Act. A Pennsylvania court determined that Mr. Serr could owe a duty of support to Jared Dotson. State v. Serr, 506 N.W.2d at 422; Appendix A-4. Thereafter, pursuant to South Dakota's Revised Reciprocal Enforcement of Support Act, paternity petitions were initiated in South Dakota circuit court to establish Mr. Serr's paternity and to compel the support. Id.

The circuit court found that Ms. Dotson and Mr. Serr had regular sexual intercourse during the relevant time period, see Appendix A-38, and also found that the Defendant, Mr. Serr, was the "biological father of Jared Dotson." Appendix A-39. The circuit court also concluded that the "statute of limitations is not applicable to the Defendant as an affirmative defense." Appendix A-41.

Defendant did not take issue with the circuit court's factual findings in the state Supreme Court, see Appellant's Brief, Appendix A-84, but did appeal on legal grounds and the state Supreme Court reversed. As noted above, when the minor child was born in 1978, South Dakota statute provided a two-year statute of limitations on a paternity action "unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support." SDCL 25-8-9 (as effective in 1978)(set out above at p. 3). The Supreme Court impliedly held, in a brief decision, that the two-year statute of limitations, as it existed in 1978, barred any action for paternity or support two years after the birth of the child. See State v. Serr, 506 N.W.2d at 422-423; Appendix A-4 to A-5, A-7. The Court further held that subsequent South Dakota legislation which extended the time for bringing paternity

actions would not be construed to be retroactive because revival of "previously time-barred claims impermissibly interferes with a defendant's vested rights and violates due process," State v. Serr, 506 N.W.2d at 423; Appendix A-8 to 9, and because the legislative intent to have the statutes apply retroactively did not plainly appear. State v. Serr, 506 N.W.2d at 423; Appendix A-8.

FEDERAL QUESTION PRESENTED BELOW

The constitutional question relating to the statute of limitations was adequately raised in the state Supreme Court.[2] Mr. Serr, as Appellant in the South Dakota Supreme Court, argued that the State and "the trial court below relied heavenly [sic] on the Supreme Court decision in the case of Pickett

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[2]See, as to the proceedings in the circuit court, an excerpt from the State's trial brief at Appendix A-74 and especially A-76, and State ex rel. Weidner v. Tyburec (1st Jud. Cir. August 3, 1989) at A-64, which was relied upon in the State's trial brief.

v. Brown, 462 U.S. 1 . . ." Appellant's Brief; Appendix A-90. Mr. Serr also argued that the South Dakota statute was distinguishable from the Tennessee statute found "violative of the equal protection clause" in Pickett. Appendix A-91.

The State, as Appellee before the South Dakota Supreme Court, argued that the "Equal Protection rights concerning a child's interest should be paramount to a putative father's claim of due process, by applying SDCL 25-8-9 retroactively." Appendix A-108. The State also quoted the Mills v. Habluetzel, 456 U.S. 91 (1982), "standard in the context of paternity actions." See Appendix A-111 to A-112.

Perhaps most significantly for present purposes, the State set out the argument of Mr. Serr that the "1978 version of SDCL 25-8-9 [the two-year statute of limitations] should apply because the State and its citizenry need

to be protected from, 'the burden of litigating state [sic] claims.'" Appendix A-112. The State refuted this argument through an analysis of Clark v. Jeter, noting that the case had held the Pennsylvania six-year statute of limitations unconstitutional, Appendix A-112, and briefly comparing the 1978 South Dakota statute with Pennsylvania's. See Appendix A-113, n. 1. Finally, the State quoted Pickett, 406 U.S. at 7-8, which in turn quoted Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 175 (1972), including language that "the Equal Protection Clause does enable us to strike down discriminatory laws relating to the status of birth. . . ." Appendix A-115.

The South Dakota Supreme Court necessarily had to reject this constitutional argument to come to the conclusion that the 1978 two-year statute of limitations could constitutionally be applied in this case. See

State v. Serr, 506 N.W.2d at 422, 423; Appendix A-5, A-7.

Other indicators also make it clear that the South Dakota Supreme Court considered whether the two-year statute of limitations in effect in 1978 was constitutional. The three members of the majority stated:

> Dotson did not specifically raise any constitutional issues on her own behalf. However, her brief discussed several U.S. Supreme Court decisions concerning Equal Protection and paternity/statute of limitation issues, all of which have been distinguished by this writing and our reliance upon and discussion in Hove.

State v. Serr, 506 N.W.2d at 423 n. 1; Appendix A-9, n. 1.

The majority particularly drew attention to Pickett v. Brown, 462 U.S. 1 (1983) asserting (incorrectly) that it had not revived a cause of action which was previously barred. State v. Serr, 506 N.W.2d at 423. Appendix A-9. The state Supreme Court further

distinguished Pickett on the alleged grounds that "the interested parties did not have adequate time to obtain child support. We do not face such an assertion here." State v. Serr, 506 N.W.2d at 423; Appendix A-9 and A-10.

Two members of the five-member court dissented separately. Justice Wuest stated:

> In the present case, the majority opinion fails to address the constitutional issues raised by appellee Dotson. As I have previously stated, the South Dakota statute of limitations fails the intermediate scrutiny test and violates the Equal Protection Clause of the Fourteenth Amendment. Therefore, the provision is void, and offers no protection to Serr.

State v. Serr, 506 N.W.2d at 423; Appendix A-11. (Wuest, J., dissenting) (emphasis added).

Justice Sabers, also in dissent, stated:

> As clearly outlined in Pickett . . . SDCL 25-8-9 was unconstitutional at all times prior to 1986 because it violated the Equal Protection Clause of the Fourteenth Amendment.

State v. Serr, 506 N.W.2d at 425; Appendix A-18. (Sabers, J., dissenting)(emphasis added).

The State, therefore, submits that the constitutional question was adequately raised below.

REASON FOR GRANTING THE WRIT.

THE DECISION OF THE SOUTH DAKOTA SUPREME COURT CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. The decisions of this Court preclude the application of a two-year statute of limitations to paternity claims.

In Weber v. Aetna Casualty and Surety Company, 406 U.S. 164, 175 (1972), this Court said:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust.

> Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual--as well as an unjust--way of deterring the parent.

In Clark v. Jeter, 486 U.S. 456, 461 (1988), this Court quoted part of this language in explaining its adoption of the "intermediate scrutiny" test to determine whether a statutory classification which discriminated on the basis of illegitimacy was valid under the Equal Protection Clause. The Court explained that to pass muster under the intermediate test "a statutory classification must be substantially related to an important governmental objective." Id.

Pursuant to the intermediate scrutiny analysis, this Court has invalidated a one-year statute of limitations on paternity suits, see Mills v. Habluetzel, 456 U.S. 91

(1982); a two-year statute of limitations on paternity suits, Pickett v. Brown, 462 U.S. 1 (1983); and a six-year statute of limitations on paternity suits, Clark v. Jeter, 486 U.S. at 464.

The Court also developed in Mills a "particular framework for evaluating equal protection challenges to statutes of limitations that apply to suits to establish paternity. . . ." Clark v. Jeter, 486 U.S. at 461-462. According to the Mills Court:

> First, the period for obtaining support . . . must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims.

Mills v. Habluetzel, 456 U.S. at 99-100.

Both prongs of this analysis must be satisfied for a statute to pass constitutional

muster. See generally, Clark v. Jeter, 486 U.S. at 464.

1. The two-year limitations period, provided in the South Dakota statute in effect in 1978, is not sufficiently long to provide a reasonable opportunity to bring suit.

In Pickett v. Brown, 462 U.S. 12-13, this Court applied the Mills test and found that Tennessee's two-year statute of limitations did not provide a reasonable opportunity to bring suit. The Tennessee statute in Pickett, like South Dakota's statute, provided that the limitations period did not run if the father "has provided support for the child or has acknowledged his paternity in writing." See Pickett v. Brown, 462 U.S. at 12; SDCL 25-8-9 (as effective 1978)(set out above at p. 3).

The Tennessee statute, however, was more generous than the South Dakota statute at issue in that Tennessee also allowed suits to be brought "by the State or by any person at

any time prior to a child's eighteenth birthday if the child is, or is liable to become, a public charge." Pickett, 462 U.S. at 12. South Dakota had no corresponding clause in 1978.

Despite the exceptions in the Tennessee statute, this Court found that its "2-year limitations period severely restricts [an illegitimate child's] right to paternal support." Id. The Court recognized that the mother's "'continuing affection for the child's father, [along with] a desire to avoid disapproval . . . or emotional strain and confusion' . . . may inhibit a mother from filing a paternity suit on behalf of the child within two years after the child's birth." Pickett, 462 U.S. at 12-13, quoting Mills, 456 U.S. at 100. The Court concluded:

> These considerations compel a conclusion that the 2-year limitations period does not provide illegitimate children with 'an

> adequate opportunity to obtain support.'

Pickett, 462 U.S. at 13, quoting Mills, 456 U.S. at 100.

South Dakota's 1978 statute fails the Pickett test. It provides for a two-year statute of limitations with certain exceptions that were also found in the Tennessee statute. Indeed, the 1978 South Dakota statute provides even fewer opportunities to establish paternity than the Tennessee statute at issue in Pickett because the South Dakota statute did not contain the exception regarding the likelihood of a child becoming a public charge.

2. The two-year limitation period is not justified by the interest in avoiding litigation of stale or fraudulent claims.

Pickett v. Brown, 462 U.S. at 13, held that a two-year time limitation was not "substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims." The Court found that the two years allowed by the Tennessee statute amounted to a "restriction effectively extinguishing the support rights of illegitimate children that cannot be justified by the problems of proof surrounding paternity actions." Id. The Court also found that the State's interest in avoiding stale or fraudulent claims could not justify the two-year statute of limitations in light of other Tennessee statutes which provided for longer statutes of limitations in similar actions. In particular, an eighteen-year statute of limitations applied to illegitimate children

in Tennessee who were likely to become public charges, and Tennessee provided that most other actions were tolled during the child's minority. Id. at 14-15. In addition, the Court found that the state's interest in a short statute of limitations "had become more attenuated" because of "scientific advances in blood testing. . . ." Id. at 17.

Clark v. Jeter reinforces and indeed broadens Pickett in that it invalidates the six-year Pennsylvania statute of limitations on paternity actions.[3] Clark v. Jeter, 486

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[3]It is of note that, according to State ex rel. Stearns v. Blume, 333 N.W.2d 721 (S.D. 1983), paternity actions may be brought as "common law" actions to enforce the duty of a father to support his minor child and a six-year statute of limitations would apply. This point is not of decisive relevance here, however, because (1) even if a six-year statute of limitations were before the court, it had expired and offers no assistance to the Petitioner here or those in a similar situation; (2) this Court has, of course, invalidated Pennsylvania's six-year statute of limitations in Clark v. Jeter; and (3) the action was not brought as a "common law"

(continued...)

U.S. at 464, pointed out that the six-year statute of limitations in Pennsylvania could not be found to be "substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims" because in "a number of circumstances, Pennsylvania permits the issue of paternity to be litigated more than six years after the birth of an illegitimate child." Thus, Pennsylvania allowed an action to enforce the obligation of the father after the six-year period had expired in the event the father had furnished support; in such cases, an action could be brought for two years after the support payment. Id. In addition, Pennsylvania's intestacy statute placed no limit on when paternity could be litigated, as long as a child could show clear and

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[3](...continued)
action, but as an action under SDCL ch. 25-8 and that is of critical importance to the state court; see Blume, 333 N.W.2d at 724.

convincing evidence to establish paternity. Id. Furthermore, this Court noted in Clark that the Pennsylvania Legislature had recently "enacted a statute that tolls most other civil actions during the child's minority." Id.

Clark v. Jeter, 486 U.S. at 465, also recognized that "increasingly sophisticated" genetic testing allowed very high confidence in excluding prospective fathers regardless of the delay in the taking of the blood test.

Under the analysis of Pickett and Clark, South Dakota's two-year statute of limitations is not "substantially related" to the interest in avoiding stale or fraudulent claims.[4]

First, as in Pickett and Clark, the "stale" claims argument is belied by the fact

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[4]The State, of course, denies Mr. Serr's interest in this issue and there is a significant issue whether he has standing to raise the State's interest in this case. Mr. Serr's interest in avoiding "stale" litigation is confined to his own alleged due process right discussed below.

that most civil actions in South Dakota are now, and were at the time of the 1978 statute, tolled "within the age of minority" SDCL 15-2-22(1). Indeed, unlike Clark v. Jeter, the South Dakota statute regarding most civil actions was already in effect at the time of the 1978 statute, making the claim to constitutional validity of the South Dakota statute even weaker.

Second, the State's interest in preventing stale claims is further undermined by the 1978 statute itself which does not apply to proceedings to enforce the obligation of (1) a father for whom paternity has been judicially established or (2) a father who has acknowledged paternity in writing or through the furnishing of support. SDCL 25-8-9 (as effective in 1978)(set out above at p. 3).

Third, the South Dakota statutes relating to intestacy proceedings were amended in 1991 to provide that an illegitimate child could

inherit from his declared father on the basis of clear and convincing proof after his death. SDCL 29-1-15.1.

Fourth, SDCL 25-8-9, the statute at issue here, was amended in 1983 to provide for a six-year statute of limitations, 1983 S.D. Sess. L. ch. 207, § 2, (set out above at p. 3) and amended again in 1986 to provide for an eighteen-year statute of limitations. 1986 S.D. Sess. L. ch. 218, § 57 (set out above at p. 4). A further amendment in 1989 removed the explicit retroactivity provision, 1989 S.D. Sess. L. ch. 222, (set out above at p. 4) but the Legislature, at least in 1986, apparently saw no "stale claim" impediment to an eighteen-year statute of limitations on paternity suits.

Finally, Clark emphasizes that the purported interest in avoiding stale evidence has been undermined by "increasingly sophisticated tests for genetic markers

[which] permit the exclusion of over 99% of those who might be accused of paternity, regardless of the age of the child." Clark v. Jeter, 486 U.S. at 465. Mr. Serr appealed to the South Dakota Supreme Court solely on the legal issues and therefore no transcript of the circuit court proceedings was ordered. See generally, Mr. Serr's Appellant's Brief, Appendix A-84. The State, however, is informed by the State's attorney, trial counsel below, that no scientific evidence of paternity was admitted into evidence in this case. Paternity was, of course, found to exist, Findings of Fact and Conclusions of Law, Appendix A-39, and no appeal was taken from this factual finding by Mr. Serr.[5]

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[5]Mr. Serr appealed to the South Dakota Supreme Court solely on the legal issues and no transcript of the circuit court proceedings was ordered. See generally, Mr. Serr's Appellant's Brief, Appendix A-84. The State, however, is informed by the State's Attorney, trial counsel below, that no scientific

(continued...)

Application of this Court's analysis, in Mills, Pickett and Clark, to the two-year statute of limitations in effect in South Dakota in 1978 demonstrates that the South Dakota statute is inconsistent with the Equal Protection Clause of the United States Constitution.[6]

B. The due process right of the putative father does not overcome the equal protection rights of the illegitimate child.

The South Dakota Supreme Court essentially held that when the Legislature had established a statute of limitations, and when the period of time under the statute had run,

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[5](...continued)
evidence of paternity was admitted into evidence in this case. (Paternity was, of course, found to exist, Findings of Fact and Conclusions of Law, Appendix A-39, and no appeal was taken from this factual finding by Mr. Serr.)

[6]Indeed, the patent inconsistency of the South Dakota statutes with Mills, Pickett and Clark may merit consideration of summary reversal of the decision below.

an attempt to revive it by a subsequent statute "impermissibly interferes with a defendant's vested rights and violates due process." State v. Serr, 506 N.W.2d at 423; Appendix A-8 to A-9.

The decision of the state Supreme Court was clearly incorrect under Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945). In Chase, certain non-registered securities had been sold in Minnesota in 1929. The six-year statute of limitations ran in 1935 and suit was commenced in 1937. The defendant asserted the statute of limitations as a defense but during the pendency of the litigation the Legislature effectively extended the statute of limitations. The defendant argued that extension of the statute of limitations violated the Due Process Clause. See Chase, 325 U.S. at 309, 311. This Court rejected defendant's claim, affirming its prior holding in Campbell v. Holt, 115 U.S. 620 (1885):

> [W]here lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar. This has long stood as a statement of the law of the Fourteenth Amendment, and we agree with the court below that its holding is applicable here and fatal to the contentions of appellant.

Chase, 325 U.S. at 311-312. The Court held that Campbell v. Holt was "sound and should not be overruled," because the "Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation." Id. at 315. The Court noted that the defenses raised by the defendant had not been undertaken on the "assumption that the old rule would be continued." Id. at 316. The Court concluded:

> Whatever grievance appellant may have at the change of policy to its disadvantage, it had acquired no immunity from this suit that has

> become a federal constitutional right.

Id. See also Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 243-244 (1976); see generally, G.D. Searle & Co. v. Cohn, 455 U.S. 404, 408 (1982).

It follows from Chase that, for the purpose of constitutional analysis, a statute of limitations goes only to remedy and not to the creation of a substantial right protectable, at least under ordinary circumstances, by the due process clause. Therefore, the state Supreme Court was wrong when it concluded that the federal due process clause mandated application of the expired two-year statute of limitations in this case.

Furthermore, this Court's holdings in Clark, Pickett and Mills preclude a finding that the putative father's due process right supersedes an illegitimate child's right under the Equal Protection Clause to a determination

of paternity and support. See generally Mills, 456 U.S. at 101, n. 9 (citing Chase Security Corp. v. Donaldson, 325 U.S. at 314). Acceptance of the South Dakota Supreme Court's decision here would surely undermine, perhaps fatally, those decisions.

3. The number of children affected by this decision is significant.

The judgment of the South Dakota Supreme Court effectively denies children born out of wedlock between 1981 and 1976 the right to bring a paternity action.

A total of approximately 8,600 children (less, of course, any children who have already somehow established paternity) could be harmed by this decision.[7]

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[7]The number of children affected is as follows:

Calendar year	Out of wedlock births
1976	1391
1977	1498
1978	1524

(continued...)

Not only could South Dakota children be harmed by this decision, but the State of South Dakota's ability to provide support for those children could also be undermined because of the potential inconsistency of South Dakota law with the Federal Child Support Enforcement Amendments passed by Congress in 1984. See 42 U.S.C. §§ 601, 666

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[7](...continued)

1979	1659
1980	1782
1981	865 (see below)

Table compiled from the following annual reports, all of which were authored by South Dakota Department of Health, Vital Records Program: "South Dakota Vital Statistics 1981" p. 11; "South Dakota Vital Statistics" 1980" p. 11; "South Dakota Vital Statistics" 1979" p. 13; "South Dakota Vital Statistics" 1978" p. 22; "South Dakota Vital Statistics" 1977" p. 35; "South Dakota Vital Statistics" 1976" p. 31; "South Dakota Vital Statistics"

(The 1983 statute, which went into effect July 1, 1983, 1983 S.D. Sess. L. ch. 207 § 2 (set out above at p. 3), would preserve the rights of children born within two years of that effective date, i.e. about one-half of the children born in 1981; the 1981 number used above has been adjusted accordingly.)

(1988). See also 45 C.F.R. § 302.70(5)(i). It may well be that South Dakota will now be threatened with the loss of funding because of this noncompliance.

More important, of course, is that as a result of the state Supreme Court decision in State v. Serr, children are not being treated equally under the law.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDICES

State of South Dakota by and through Department of Social Services, ex rel. Gail A. Dotson v. Meryl D. Serr; South Dakota Supreme Court; No. 18058 A-2

State of South Dakota v. Serr; Sixth Judicial Circuit, Gregory County, South Dakota; Findings of Fact and Conclusions of Law (7/30/91) A-21

State of South Dakota v. Serr; Sixth Judicial Circuit, Gregory County, South Dakota; Order Denying Motion to Dismiss (7/30/91) A-29

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State of South Dakota v. Serr; Sixth Judicial Circuit, Gregory County, South Dakota; Findings of Fact and Conclusions of Law (5/12/92) A-32

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State of South Dakota v. Serr; Sixth Judicial Circuit, Gregory County, South Dakota; Second Amended Judgment of Paternity and Order of Support A-58

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State of South Dakota v. Serr; Appellant's Brief; Supreme Court of South Dakota; Appeal from the Circuit Court, Sixth Judicial Circuit, Gregory County, South Dakota; No. 18058 (10/22/92) A-78

State of South Dakota v. Serr; Appellee's Brief; Supreme Court of South Dakota; Appeal from the Circuit Court, Sixth Judicial Circuit, Gregory County, South Dakota; No. 18058 A-100

APPENDIX A

STATE OF SOUTH DAKOTA, by and through the DEPARTMENT OF SOCIAL SERVICES, EX REL GAIL A. DOTSON, in her own behalf and on behalf of J.D., a minor child,
Plaintiff and Appellee,

v.

MERYL D. SERR,
Defendant and Appellant.

In the Supreme Court
of the
State of South Dakota
No. 18058

Submitted March 18, 1993

Filed October 6, 1993

Appeal from the Circuit Court of
the Sixth Judicial Circuit
Gregory County, South Dakota

Before the Honorable Max A. Gors
Circuit Court Judge

HENDERSON, Justice (on reassignment).

Meryl D. Serr (Serr), now of Gregory, South Dakota, appeals from an amended judgment of paternity and order of support based upon the trial court's retroactive application of SDCL 25-8-9. Once again, this Court is being

asked if a cause of action previously barred by a statute of limitations, can be revived through subsequent legislation. Based upon our decision in State of Minnesota ex rel. Hove v. Doese, 501 N.W.2d 366 (S.D. 1993), we reverse.

PROCEDURAL HISTORY/FACTS

On June 6, 1978, Gail Dotson (Dotson) gave birth to a son in Pennsylvania. Now, some thirteen years later, she alleges that Serr is the father, based upon a sexual relationship the two had in Nevada prior to 1978, and seeks child support. Serr left Nevada in December, 1977, and had no contact with Dotson until 1989 or 1990 when she made the revelation via a letter and photograph of the child.

On December 6, 1989, Dotson began to receive Aid to Dependent Children in Pennsylvania and applied for child support services pursuant to Pennsylvania's Revised

Uniform Reciprocal Enforcement of Support Act. See 23 Pa. Cons. Stat. Ann. §§ 4501-4540 (1991). Ex parte, the Court of Common Pleas of Erie County, Pennsylvania, found that Dotson had set forth facts from which it could be determined that Serr owed a duty of support. The certificate of facts and certified copies of Dotson's complaint and paternity petition were forwarded to South Dakota's Department of Social Services and the Gregory County Clerk of Courts.

Pursuant to SDCL ch. 25-9A, the Revised Reciprocal Enforcement of Support Act, and SDCL ch. 25-8, Paternity Proceedings, the State of South Dakota, on behalf of Dotson and her son, initiated an action in Gregory County, thirteen years after the child's birth, to establish Serr's paternity and to compel his support. Serr made a special appearance and filed a motion to dismiss which

alleged, in part, that the action was barred by this state's statute of limitations.

When Dotson's son was born in 1978, SDCL 25-8-9 provided:

> Proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support.

Serr contended that under the facts of this case a cause of action for paternity became barred in June 1980.

Between the birth of Dotson's son and the commencement of this action, however, SDCL 25-8-9 underwent revision three times. In 1983, SDCL 25-8-9 was amended to read:

> Proceedings to enforce the obligation of the father may not be brought after the lapse of more than six years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support.

1983 S.D. Sess. L. ch. 207, § 2.

In 1986, the amendment to SDCL 25-8-9 provided:

> Proceedings to establish paternity and enforce the obligation of the father may be brought at any time prior to the eighteenth birthday of the child. The provisions of this section apply to all children who have been born since July 1, 1968.

1986 S.D. Sess. L. ch. 218, § 57.

At the time this action was instituted, the legislature had deleted that portion of SDCL 25-8-9 which applied its provisions to all children born since July 1, 1968. SDCL 25-8-9 provided:

> Proceedings to establish paternity and enforce the obligation of the father may be brought at any time before the eighteenth birthday of the child.

1989 S.D. Sess. L. ch. 222. The trial court concluded that the 1989 amendment to SDCL 25-8-9 controlled and had retroactive effect. Consequently, it denied Serr's motion to dismiss.

Serr subsequently denied paternity and alleged as an affirmative defense that the statute of limitations barred any cause of action for paternity or support. The trial court entered findings of fact and conclusions of law and concluded that Serr was the biological father of Dotson's son and owed a duty of support. Also, the trial court held that "[t]he statute of limitations is not applicable to [Serr] as an affirmative defense."

ISSUE

DOES THE 1989 AMENDMENT TO SDCL 25-8-9 HAVE RETROACTIVE EFFECT?

DECISION

Serr contends that the statute of limitations found in SDCL 25-8-9, as it existed in 1978, controls and barred any action for paternity and support after June 6, 1980. The issue of whether the 1989 amendment to SDCL 25-8-9 has retroactive application was

exhaustively reviewed in our recent decision in Hove, supra. We held that it does not have retroactive application. In so holding, we pointedly mentioned that SDCL 2-14-21 clearly states that no part of the code "shall be construed as retroactive unless such intention plainly appears." As we previously expressed in Hove at 368, "In 1986, such intention did plainly appear as: '[t]he provisions of this section apply to all children who have been born since July 1, 1968.' Yet, this language was removed from the 1989 version of SDCL 25-8-9, and with it any plain intention of retroactivity."

In addition, we noted that because statutes of limitation affect substantive rights they are not given retroactive effect. According to courts addressing the issue, legislation attempting to revive previously time-barred claims impermissibly interferes with a defendant's vested rights and violates

due process. The purpose of statutes of limitations is speedy and fair adjudication of the parties' respective rights. The allowance of a retroactive limitation period would make this purpose meaningless.

We note that Dotson raised United States Supreme Court authorities not discussed in Hove.[1] Both Chase Securities Corp. v. Donaldson, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945), and Pickett v. Brown, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983), reviewed retroactivity of statutes; however, neither decision revived a cause of action previously barred. Moreover, Pickett held that the interested parties did not have adequate time to obtain child support. We do

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[1]Dotson did not specifically raise any constitutional issues on her own behalf. However, her brief discussed several U.S. Supreme Court decisions concerning Equal Protection and paternity/statute of limitation issues, all of which have been distinguished by this writing and our reliance upon and discussion in Hove.

not face such an assertion here. Rather, thirteen years after the birth of her son, Dotson only seeks retroactive application of a barred claim. Authorities she now cites do not necessitate such a broad proposition. For these reasons and the rationale discussed in that opinion, we adhere to our decision in Hove. Consequently, Dotson's cause of action is barred.

Reversed.

MILLER, Chief Justice, and AMUNDSON, Justice, concur.

WUEST and SABERS, Justices, dissent.

WUEST, Justice (dissenting).

For the reasons expressed in my dissent in Minnesota ex rel. Hove v. Doese, 501 N.W.2d 366, 371-74 (S.D. 1993)(Wuest, J., dissenting), I dissent. In the present case, the majority opinion fails to address the constitutional issues raised by appellee Dotson. As I have previously stated, the South Dakota statute of limitations fails the intermediate scrutiny test and violates the Equal Protection Clause of the Fourteenth Amendment. Therefore, the provision is void, and offers no protection to Serr.

SABERS, Justice (dissenting).

I dissent.

The trial court correctly applied the 1989 amendment to SDCL 25-8-9 retroactively since it is a statute affecting a remedy which merely continued an eighteen-year limitation period that had earlier been made applicable to children born since July 1, 1968. Therefore, the trial court should be affirmed.

SDCL 25-8-9 is a pure statute of limitations and not a conditions which the law attaches to the right to maintain an action. Statutes of limitations are remedial, not substantive. Chase, 325 U.S. at 314, 65 S. Ct. at 1142, 89 L. Ed. at 1636 (as a matter of constitutional law, statutes of limitations go to matters of remedy, not to destruction of fundamental rights); Lyons v. Lederle Laboratories, 440 N.W.2d 769 (S.D. 1989). Although statutes will not be applied retroactively unless a clear intention of such

operation is indicated, SDCL 2-14-21, In re Estate of Scott, 81 S.D. 231, 133 N.W.2d 1 (1965), "[a]s early as 1928, this court has held that statutes [a]ffecting remedy or procedure as opposed to those affecting substantial rights are given retroactive effect." Lyons, 440 N.W.2d at 770 (citations omitted). This principle was unanimously affirmed by this Court in West v. John Morrell & Co., 460 N.W.2d 745 (S.D. 1990)(statutes which are merely procedural or remedial are to be given retroactive effect) and Dahl v. Sittner, 474 N.W.2d 897 (S.D. 1991)(where a new statute deals only with procedure, it applies to all actions, including those which have already accrued or are pending).

According to the majority writing, Chase and Pickett are distinguishable authority because neither case "revived a cause of action previously barred." I disagree. In Pickett, Child was born on November 1, 1968.

Mother filed an action to establish paternity in May, 1978. The applicable statute of limitations provided that "[p]roceedings to establish the paternity of the child and to compel the father to furnish support . . . shall not be brought after the lapse of more than two (2) years from the birth of the child." Pickett, 462 U.S. at 3 n. 1, 103 S. Ct. at 2201 n. 1, 76 L. Ed. 2d at 376 n. 1 (citing Tennessee Code Ann. § 36-224(2) (1977)). In an unanimous decision, the United States Supreme Court struck down the Tennessee statute, holding that the statute denied "certain illegitimate children the equal protection of the laws guaranteed by the Fourteenth Amendment" and remanded the case for proceedings not inconsistent with its opinion. Pickett, 462 U.S. at 18, 103 S. Ct. at 2209, 76 L. Ed. 2d at 386. In other words, the Court revived Mother's cause of action, which the present majority would claim was

barred two years after the birth of Child. While Pickett stated that a two-year limitations period does not provide illegitimate children with an adequate opportunity to obtain support, Clark v. Jetter, 486 U.S. 456, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988) stated that "[e]ven six years does not necessarily provide a reasonable opportunity to assert a claim on behalf of an illegitimate child." Id. at 463.[2]

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[2]Statutes of limitations that apply to suits to establish paternity must pass both prongs of a two-pronged analysis to survive an equal protection challenge. "First, the period for obtaining support . . . must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims." Clark, 486 U.S. at 462, 108 S. Ct. at 1914, 100 L. Ed. 2d at 472 (citation omitted)(emphasis added).

In Chase, the non-registered securities were sold on August 10, 1929. The action to recover the purchase price of the securities was brought in November, 1937. The defendant seller asserted Minnesota's six-year statute of limitations as a defense. While proceedings were pending in the lower court, the legislature enacted a statuted, effective July 1, 1941, which amended the Blue Sky Law. The statute provided that "where delivery had occurred more than five years prior to the effective date of the Act, which was the fact in this case, the action might be brought within one year after the law's enactment." Chase, 325 U.S. at 308, 65 S. Ct. at 1139, 89 L. Ed. at 1632. The defendant argued that the statute, if applied so to lift the bar, deprived him of property without due process of law, in violation of the Fourteenth Amendment.

The Supreme Court, noting that "[a]s the case stood in the state courts it is not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor," id. at 310, stated that "it cannot be said that lifting the bar of a statute of limitations so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment." Id. at 316. The Court went on to apply the new limitations statute retroactively, citing with approval its holding in Campbell v. Holt that "where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his

remedy, and divest the defendant of the statutory bar." Id. at 311-12.

Retroactively aside, SDCL 25-8-9, as it existed prior to the 1986 amendment, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See Clark, 486 U.S. 456, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988)(Supreme Court addressed only the equal protection claim, stating that whether statutes of limitations are applied retroactively is a matter of state law). As clearly outlined in Pickett, 462 U.S. 1, 103 S. Ct. 2199, 76 L. Ed. 2d 372 (two-year statute of limitations held unconstitutional), SDCL 25-8-9 was unconstitutional at all times prior to 1986 because it violated the Equal Protection Clause of the Fourteenth Amendment. See generally, Feltman v. Feltman, 434 N.W.2d 590, 594 (S.D. 1989)(Henderson, J., dissenting)(discrimination against children of a "non-custodial" parent's second family is a

as irrational, and hence unconstitutional, as discrimination against illegitimate children). As noted above, the statute was amended in 1986 to allow paternity proceedings any time prior to the eighteenth birthday of any child. Therefore, as in Pickett and Clark, because the statute at issue was unconstitutional, it is not, nor was it ever, available to the defendant as an affirmative defense.[3]

As the Supreme Court so aptly stated in Trimble v. Gordon:[4]

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an

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[3]Absent the statute, the child is on equal footing with legitimate children, and Dotson would have until the child reached the age of eighteen to establish paternity and seek child support.

[4]Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977), rejected the Illinois intestate succession act which foreclosed an illegitimate child's paternal inheritance rights.

> infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual -- as well as an unjust -- way of deterring the parent. The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status.

Id. at 769-770 (citation omitted). And yet, by refusing to allow this cause of action, the Supreme Court of the State of South Dakota is once again imposing an unconstitutional disability on illegitimate children. See State of Minnesota ex rel. Hove v. Doese, 501 N.W.2d 366 (S.D. 1993). We should affirm.

APPENDIX B

GREGORY COUNTY, SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT COURT

STATE OF SOUTH DAKOTA,
by and through the
DEPARTMENT OF SOCIAL SERVICES,
EX REL GAIL A. DOTSON, in her
own behalf and on behalf of
JARED DOTSON, a minor child,

Plaintiff

v.

MERYL D. SERR,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREAS, the Defendant, Meryl D. Serr, having made a special appearance by motion, wherein he challenges the jurisdiction of this Court to proceed pursuant to the Revised Reciprocal of Enforcement of Support Act or SDCL 25-8, and further challenged the commencement of this action, alleging that the applicable statute of limitations has run; that the Defendant noticed his motion on for hearing for the 27th day of June, 1990; that

at such hearing, the Defendant appeared specially by his attorney, Wally Eklund, of Gregory, South Dakota; the Gregory County State's Attorney as Special Assistant Attorney General, John D. Jacobsen, having appeared on behalf of the State of South Dakota; the Court having considered the arguments of counsel, hereby enters its

FINDINGS OF FACT

1.

That Gail A. Dotson is a resident of Erie County, Pennsylvania, and gave birth to Jared Dotson on the 6th day of June 1978. That Jared Dotson was born in Erie County, Pennsylvania.

2.

That Meryl D. Serr is a resident of Gregory County, South Dakota, and is the putative father of Jared Dotson.

3.

That the mother, Gail A. Dotson, alleges that she and the putative father, Meryl D. Serr, cohabitated and lived together in Austin, Nevada, from June 1977, to and through December 1977, during which time she further alleges, that Jared Dotson was conceived by herself and Meryl D. Serr. That the Plaintiff, Gail A. Dotson, did in the County of Erie, State of Pennsylvania, make an application for Child Support Services with that state's Domestic Relations Division. Such application was by Verified Complaint and Paternity Petition Number DR893625, which documents are dated December 6, 1989. That such Complaint and Paternity Petition state upon their face that they are made pursuant to the "Uniform Reciprocal Enforcement of Support Act." That the Complaint and the Paternity Petition which are a part of this Court's file and referred to herein are made a part of this

Court's Findings of Fact, incorporated herein by reference as though fully set forth herein.

4.

That pursuant to the Plaintiff's Application for Child Support Services made before the Domestic Relations Division of the County of Erie, Pennsylvania, said Plaintiff presented testimony to the Domestic Relations Division of the Court of Common Pleas of Erie County, Pennsylvania. Said testimony has been transcribed, a full copy of such transcription is a part of this Court's file and this Court hereby incorporates said testimony as a part of its Findings of Fact as if fully set forth herein. Said testimony being dated December 6, 1989.

5.

That the judge for the Court of Common Pleas of Erie County, Pennsylvania, Family Court Division, pursuant to Pennsylvania's Revised Reciprocal Enforcement of Support Act,

specifically made a finding that the Complaint and Paternity Petition made by Gail A. Dotson before the Domestic Relations Division set forth facts from which it may be determined that Meryl Serr owed a duty of support and that the State of South Dakota could obtain jurisdiction over Meryl Serr or his property. The judge for the Court of Common Pleas caused a certificate of such facts to be filed and further caused copies of such certificate, Complaint, Paternity Petition and sworn testimony to be forwarded to the State of South Dakota, as a responding State.

6.

That Gail A. Dotson, at the time of the commencement of these proceedings, prior thereto and at the current time, is receiving public assistance in Erie County, Pennsylvania, and as such, assigned her collection rights against the putative father to the paying authority.

7.

That an action was commenced against Meryl D. Serr by Complaint, which Complaint alleges the jurisdiction of the Revised Reciprocal of Enforcement of Support Act and SDCL 25-8. Said complaint alleges the Defendant, Meryl D. Serr, to be the father of Jared Dotson; alleges that the Defendant, Meryl D. Serr, is required to support his minor child; alleges the right of the Plaintiff to receive a judgment against the Defendant equalling the sum of all such public assistance actually paid to Gail A. Dotson; further alleges the Defendant's obligation to provide medical insurance coverage for the minor child, Jared Dotson.

8.

That this action was commenced by personal service of the Summons and the Complaint upon the Defendant, Meryl D. Serr,

upon the 21st day of May 1991, at Gregory, South Dakota.

CONCLUSIONS OF LAW

I.

That this Court has jurisdiction over the causes of action alleged in the Plaintiff's complaint.

II.

That the Revised Uniform Reciprocal Enforcement of Support Act is applicable to this action; the State of Pennsylvania is deemed to be the initiating state and the State of South Dakota is deemed to be the responding state.

III.

That this Court has jurisdiction to entertain the cause of action in the Plaintiff's Complaint, which alleges the paternity of the Defendant, Meryl D. Serr.

IV.

This Court further concludes that based upon SDCL 25-8-9 and earlier versions of that statute, the legislature intended such statute to apply retroactively. Therefore, as applies to this case, SDCL 25-8-9 current version is applicable to the facts of this case and the statute of limitations for bringing a paternity action or a support action has not run.

Dated this 30th day of July, 1991.

BY THE COURT:

/s/ Max A. Gors
Circuit Court Judge

ATTEST:

By /s/ Deborah Kaupp
Clerk

APPENDIX C

GREGORY COUNTY, SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT COURT

STATE OF SOUTH DAKOTA,
by and through the
DEPARTMENT OF SOCIAL SERVICES,
EX REL GAIL A. DOTSON, in her
own behalf and on behalf of
JARED DOTSON, a Minor Child,

Plaintiff,

vs.

MERYL D. SERR,

Defendant.

ORDER DENYING MOTION TO DISMISS

WHEREAS, the Defendant having made a Motion to Dismiss based upon lack of jurisdiction and the running of the statute of limitations; a hearing having been held on said motion, the Court duly entered its Findings of Fact and Conclusions of Law, now therefore, it is

ORDERED, ADJUDGED AND DECREED, that the Defendant's motion is hereby denied in its entirety.

Dated this 30th day of July, 1991.

BY THE COURT:

/s/ Max A. Gors
Circuit Court Judge

ATTEST:

By /s/ Deborah Kaupp
Clerk

APPENDIX D

30 July 1991

John D. Jacobsen
Box 435
Burke, SD 57523-0435

Wally Eklund
Box 149
Gregory, SD 57533-0149

re: State ex rel Dotson v. Serr

Counsel:

I have reviewed Mr. Eklund's proposals and Mr. Jacobsen's responses. My ruling from the bench was wrong. SDCL 25-8-9 is retroactive. In addition, SDCL 25-9A-28 makes the issue paternity cognizable in this action. Accordingly, I have refused Mr. Eklund's proposals and signed Mr. Jacobsen's proposals.

Sincerely,

/s/ Max A. Gors
Circuit Court Judge

APPENDIX E

STATE OF SOUTH DAKOTA
by and through the
DEPARTMENT OF SOCIAL SERVICES,
EX REL GAIL A. DOTSON, in her
own behalf and on behalf of
JARED DOTSON, a minor child,
Plaintiff,

v.

MERYL D. SERR,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
COUNTY OF GREGORY
STATE OF SOUTH DAKOTA

WHEREAS, a trial to the Court having been held on the 20th day of April, 1992, in the City of Burke, County of Gregory, State of South Dakota. The State of South Dakota being represented by John D. Jacobsen, Gregory County State's Attorney, of Burke, South Dakota, and the Defendant being personally present, along with his attorney, Wally Eklund, of Gregory, South Dakota. The Court having heard evidence presented, having

considered the arguments of counsel and the pleadings in this case, hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

That Gail A. Dotson is a resident of Erie County, Pennsylvania, and gave birth to Jared Dotson on the 6th day of June, 1978. That Jared Dotson was born in Erie County, Pennsylvania.

2.

That Meryl D. Serr is a resident of Gregory County, South Dakota.

3.

That the Plaintiff, Gail A. Dotson, did in the County of Erie, State of Pennsylvania, make an application for child support services with that state's Domestic Relations Division. Such application was by verified Complaint and Paternity Petition #DR893625, which documents

are dated December 6, 1989. That such Complaint and Paternity Petition state upon their face that they are made pursuant to the "Revised Uniform Reciprocal Enforcement of Support Act." That the Complaint and the Paternity Petition which are a part of this Court's file and referred to herein are made a part of this Court's Findings of Fact and incorporated herein by reference as though fully set forth therein.

4.

That pursuant to the Plaintiff's Application for Child Support Services made before the Domestic Relations Division of the County of Erie, State of Pennsylvania, said Plaintiff presented testimony to the Domestic Relations Division of the Court of Common Pleas of Erie County, Pennsylvania. Said testimony has been transcribed and a full copy of such transcription is a part of this Court's file and this Court hereby

incorporates said testimony as a part of its Findings of Fact herein, as if fully set forth herein. Said testimony being dated December 6, 1989.

5.

That the Judge for the Court of Common Pleas of Erie County, Pennsylvania, Family Court Division, pursuant to Pennsylvania's Revised Reciprocal Enforcement of Support Act, specifically made a finding that the Complaint and Paternity Petition made by Gail A. Dotson before the Domestic Relations Division set forth facts from which it may be determined that the Defendant owed a duty of support and that the State of South Dakota could obtain jurisdiction over the Defendant or his property. The Judge for the Court of Common Pleas caused a Certificate of such facts to be filed and further caused copies of such Certificate, Complaint and Paternity Petition

and sworn testimony to be forwarded to the State of South Dakota as a responding state.

6.

That the State of South Dakota, by and through the Department of Social Services, Child Collection Services, having initiated an action in the County of Gregory, State of South Dakota, alleging the Defendant, Meryl D. Serr, to be the father of Jared Dotson and as such, owed a duty of support for said minor child. Said action was commenced under the provisions of SDCL 25-9A and SDCL 25-8.

7.

That the action was commenced by personal service of the Summons and Complaint upon the Defendant, Meryl D. Serr, on the 21st day of May, 1991, in Gregory, Gregory County, South Dakota.

8.

That the minor child, Jared Dotson, was born on the 6th day of June, 1978, in the County of Erie, Erie, Pennsylvania.

9.

That the Defendant, Meryl D. Serr, presently is and has been a resident of Gregory County, South Dakota, since the initiation of these proceedings.

10.

That the minor child, Jared Dotson, has since birth resided with his mother, Gail A. Dotson.

11.

That no other proceedings concerning the custody of said minor child, Jared Dotson, are pending in any other jurisdiction.

12.

That the Defendant, Meryl D. Serr, is an Obligor as that term is defined in SDCL 25-9A.

13.

That from approximately June 1977, to mid-November 1977, Gail A. Dotson and the Defendant, Meryl D. Serr, resided in the State of Nevada. That during said period of time, Gail A. Dotson and Meryl D. Serr had a personal relationship and that relationship involved them having sexual intercourse on an average of at least two to three times per week.

14.

That during their relationship, Meryl D. Serr led Gail A. Dotson to believe that he was sterile and incapable of siring. That due to such belief, Gail A. Dotson did not use any type of birth control device, nor did Defendant, Meryl D. Serr, use any type of birth control device on any occasion that they had sexual intercourse.

15.

That from June 1977 to mid-November 1977, Gail A. Dotson had sexual intercourse with one other man besides the Defendant, Meryl D. Serr; said sexual intercourse having taken place only one time, during which birth control was utilized.

16.

That Gail A. Dotson became pregnant with her son, Jared Dotson, in either September or October of 1977.

17.

That Gail A. Dotson gave birth to Jared Dotson on June 6, 1978, having carried said Jared Dotson during her pregnancy, full term.

18.

This Court finds by a preponderance of the evidence that the Defendant, Meryl D. Serr, is the biological father of Jared Dotson.

19.

This Court finds that the statute of limitations is not available as an affirmative defense for the Defendant.

20.

This Court finds that it has proper jurisdiction over these proceedings pursuant to SDCL 25-8 and SDCL 25-9A.

21.

This Court finds that Gail A. Dotson is a fit and proper person to have the care, custody and control of the minor child, Jared Dotson, and that no cause exists or has been shown as to why Gail A. Dotson should not continue to have the care, custody and control of the minor child, Jared Dotson.

Based upon the above Findings of Fact, this Court concludes:

CONCLUSIONS OF LAW

I.

This Court has jurisdiction over these proceedings.

II.

The statute of limitations is not applicable to the Defendant as an affirmative defense.

III.

This Court concludes that the Defendant, Meryl D. Serr, is the biological father of Jared Dotson, who was born to Gail A. Dotson on the 6th day of June, 1978.

IV.

This Court concludes that the Defendant, Meryl D. Serr, owed a duty of support concerning the minor child, Jared Dotson; said duty of support to continue until the child's eighteenth birthday or graduation from secondary school.

V.

This Court concludes that the care, custody and control of the minor child, Jared Dotson, shall remain with his mother, Gail A. Dotson.

Dated this 12 day of May, 1992.

BY THE COURT:

/s/ Max A. Gors
Circuit Court Judge

ATTEST:

By /s/ Deborah Kaupp
Clerk

APPENDIX F

GREGORY COUNTY, SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT COURT

STATE OF SOUTH DAKOTA,
by and through the
DEPARTMENT OF SOCIAL SERVICES,
EX REL GAIL A. DOTSON, in her
own behalf and on behalf of
JARED DOTSON, a minor child,

Plaintiff

v.

MERYL D. SERR,

Defendant.

JUDGMENT OF PATERNITY AND SUPPORT

WHEREAS, this matter having come on for trial on the 20th day of April, 1992, at the Gregory County Courthouse in the City of Burke, County of Gregory, State of South Dakota. Present at trial and on behalf of the State of South Dakota was John D. Jacobsen, Gregory County State's Attorney, along with the Plaintiff, Gail A. Dotson; the Defendant, Meryl D. Serr, being personally present along with his attorney, Wally Eklund, of Gregory,

South Dakota. The Court having considered the pleadings, having heard testimony and considered the arguments of counsel and having previously entered its Findings of Fact and Conclusions of Law, hereby:

ORDERS, ADJUDGES AND DECREES, that Meryl D. Serr is the biological parent and father of Jared Dotson, a minor child, having been born on June 6, 1978, and is thus responsible for the financial support of Jared Dotson.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the mother, Gail A. Dotson, shall have the care, custody and control of Jared Dotson, subject to the reasonable visitation rights of the Defendant, Meryl D. Serr.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the amount of child support due the Plaintiff shall be set by this Court at a later date.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the State of South Dakota shall have a judgment against the Defendant, Meryl D. Serr, in the amount of $3,672.38.

Dated this 12 day of May, 1992.

BY THE COURT:

/s/ Max A. Gors
Circuit Court Judge

ATTEST:

By /s/ Deborah Kaupp
Clerk

APPENDIX G

GREGORY COUNTY, SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT COURT

STATE OF SOUTH DAKOTA,
by and through the
DEPARTMENT OF SOCIAL SERVICES,
EX REL GAIL A. DOTSON, in her
own behalf and on behalf of
JARED DOTSON, a minor child,

Plaintiff

v.

MERYL D. SERR,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREAS, a hearing having been held on the 12th day of June 1992, at the Gregory County Courthouse, in the City of Burke, County of Gregory, State of South Dakota. The Court having previously issued its Judgment of Paternity, finding the Defendant to be the biological father of Jared Dotson, a minor child. The hearing on June 12, 1992, was for the purposes of determining what level of support the Defendant should pay toward child

support and what amount the State of South Dakota could take as a judgment for delinquent child support. The Defendant, Meryl D. Serr, being personally present, along with his attorney, Wally Eklund, of Gregory, South Dakota, and the State being represented by John D. Jacobsen of Burke, South Dakota. The Court having considered the arguments of counsel, having received testimony and being further advised in the premises, hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

That Gail A. Dotson became a recipient of Public Assistance in December of 1989, she receiving her assistance from the State of Pennsylvania.

2.

Concerning the mother, Gail A. Dotson's income, this Court finds that from January

1990 to June 1990, the mother, Gail A. Dotson, was receiving Aid to Dependant Children for and in behalf of her minor son, Jared Dotson, said total public assistance being in the amount of $542.00 per month. That since October of 1991 to the present date, Gail A. Dotson has been unemployed and has been receiving the amount of $474.00 every two weeks as unemployment compensation. This Court further finds that $474.00 in unemployment compensation every two weeks amounts to a total of $1,027.00 per month. Gail A. Dotson is a single person and based upon a monthly income of $1,027.00 per month the monthly withholding would be $65.00 and the withholding for social security tax would be $79.00. This would leave a net income attributable to the mother in the amount of $883.00 per month.

3.

Concerning the father, Meryl D. Serr's income for the time period of December 1989 through the present, this Court finds that the Defendant suffers from disabilities but has not applied for disability income with the Social Security Administration. This Court further finds that the Defendant has no income-generating assets and therefore attributes to him the minimum wage when utilizing the child support guidelines. That Meryl D. Serr is a single person and the guidelines attribute a minimum wage in the amount of $659.00 per month. A single person's withholding on minimum wage income for the amount is $11.00 per month, while social security withholding equals $50.00 per month. The net take-home pay is deemed to be $598.00 per month.

4.

Given both the parents' net take-home pay of $1,481.00 per month, the level of support delineated in the guidelines for the monetary support necessary for one child is $257.00 per month. This Court finds that the Defendant father's percentage obligation for that support is forty percent; therefore, the father's monthly child support obligation is in the amount of $103.00.

5.

This Court finds that it would be proper to attribute the minimum wage to the father for the entire period of support, that being from December 1989 through May 31, 1992. Thus, the Defendant's child support obligation per month since December 1989 is $103.00

6.

This Court finds that there are no deviation factors present in this case and

therefore specifically finds that the child support amount of $103.00 is reasonable.

7.

This Court finds it reasonable to assess against the Defendant a payment obligation of $17.00 per month toward arrearages.

8.

This Court further finds that the Defendant has an obligation to assist the mother toward any health care costs that are incurred by the minor child, Jared Dotson. This Court finds it reasonable to require the Defendant to pay forty percent (40%) of the total health care costs.

That based upon the above Findings of Fact, this Court concludes:

CONCLUSIONS OF LAW

I.

That this Court has jurisdiction over these proceedings.

II.

That the Defendant, Meryl D. Serr, shall pay monthly child support in the amount of $103.00. Such support to commence as of December 1989.

III.

That the Defendant, Meryl D. Serr, shall pay child support arrearages in the amount of $17.00 per month.

IV.

That the State of South Dakota shall take a judgment against the Defendant for delinquent child support in the amount of $3,090.00, which represents child support from the period of December 1989 through May 31, 1992.

V.

That the Defendant is responsible for forty percent (40%) of all of the minor

child's health care costs, which includes health insurance premiums.

Dated this 26 day of June, 1992.

BY THE COURT:

/s/ Max A. Gors
Circuit Court Judge

ATTEST:

By /s/ Deborah Kaupp
Clerk

APPENDIX H

GREGORY COUNTY, SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT COURT

STATE OF SOUTH DAKOTA,
by and through the
DEPARTMENT OF SOCIAL SERVICES,
EX REL GAIL A. DOTSON, in her
own behalf and on behalf of
JARED DOTSON, a minor child,

Plaintiff

v.

MERYL D. SERR,

Defendant.

AMENDED JUDGMENT OF PATERNITY
AND ORDER OF SUPPORT

WHEREAS, this matter having come on for trial on the 20th day of April 1992, at the Gregory County Courthouse, in the City of Burke, County of Gregory, State of South Dakota. A continued hearing having been held on the issue of support on the 12th day of June 1992, at the Gregory County Courthouse, in the City of Burke, State of South Dakota. Present at such trial and continued hearing and on behalf of the State of South Dakota was

John D. Jacobsen, Gregory County State's Attorney. The Defendant, Meryl D. Serr, along with his attorney, Wally Eklund, being present at both the trial and the hearing. The Plaintiff, Gail A. Dotson, being personally present on April 20, 1992. The Court having considered the pleadings, having heard testimony and considered the arguments of counsel and having previously entered its Findings of Facts and Conclusions of Law, hereby;

ORDERS, ADJUDGES AND DECREES, that Meryl D. Serr is the biological parent and father of Jared Dotson, a minor child, who was born on June 6, 1978, and is thus responsible for the financial support of Jared Dotson.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the mother, Gail A. Dotson, shall have the care, custody and control of Jared Dotson, subject to the reasonable

visitation rights of the Defendant, Meryl D. Serr.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the State of South Dakota shall have a judgment against the Defendant, Meryl D. Serr, in the amount of $3,090.00, which amount represents delinquent child support form December 1989 through May 1992.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Defendant, Meryl D. Serr, is hereby ordered to pay $103.00 per month child support for the minor child, Jared Dotson. The first said child support payment shall be due on June 15, 1992, payable to the Gregory County Clerk of Courts office and a like amount on the 15th day of each and every month thereafter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Defendant, Meryl D. Serr, shall pay $17.00 per month toward child support arrearages, which payment is due on

the 15th day of June 1992, and on the 15th day of every month thereafter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Defendant, Meryl D. Serr, is responsible for forty percent of all of Jared Dotson's health care. If the mother provides health insurance coverage for the minor child the Defendant is responsible for forty percent of said health insurance premium and further responsible for forty percent of all health care costs not covered by insurance.

Dated this 26 day of June, 1992.

BY THE COURT:

/s/ Max A. Gors
Circuit Court Judge

ATTEST:

By /s/ Deborah Kaupp
Clerk

APPENDIX I

GREGORY COUNTY, SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT COURT

STATE OF SOUTH DAKOTA,
by and through the
DEPARTMENT OF SOCIAL SERVICES,
EX REL GAIL A. DOTSON, in her
own behalf and on behalf of
JARED DOTSON, a minor child,

Plaintiff

v.

MERYL D. SERR,

Defendant.

SECOND AMENDED JUDGMENT
OF PATERNITY AND ORDER OF
SUPPORT

WHEREAS, this matter having come on for trial on the 20th day of April 1992, at the Gregory County Courthouse, in the City of Burke, County of Gregory, State of South Dakota. A continued hearing having been held on the issue of support on the 12th day of June 1992, at the Gregory County Courthouse, in the City of Burke, State of South Dakota. Present at such trial and continued hearing

and on behalf of the State of South Dakota was John D. Jacobsen, Gregory County State's Attorney. The Defendant, Meryl D. Serr, along with his attorney, Wally Eklund, being present at both the trial and the hearing. The Plaintiff, Gail A. Dotson, being personally present on April 20, 1992. The Court having considered the pleadings, having heard testimony and considered the arguments of counsel and having previously entered its Findings of Fact and Conclusions of Law, hereby;

ORDERS, ADJUDGES AND DECREES, that Meryl D. Serr is the biological parent and father of Jared Dotson, a minor child, who was born on June 6, 1978, and is thus responsible for the financial support of Jared Dotson.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the mother, Gail A. Dotson, shall have the care, custody and control of Jared Dotson, subject to the reasonable

visitation rights of the Defendant, Meryl D. Serr.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the State of South Dakota shall have a judgment against the Defendant Meryl D. Serr, in the amount of $3,090.00, which amount represents delinquent child support from December 1989 through May 1992.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Defendant, Meryl D. Serr, is hereby ordered to pay $103.00 per month child support for the minor child, Jared Dotson. The first said child support payment shall be due on June 15, 1992, payable to the Gregory County Clerk of Courts office and a like amount on the 15th day of each and every month thereafter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Defendant, Meryl D. Serr, shall pay $17.00 per month toward child support arrearages, which payment is due on

the 15th day of June 1992, and on the 15th day of every month thereafter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Defendant, Meryl D. Serr, is responsible for forty percent of all of Jared Dotson's health care. If the mother provides health insurance coverage for the minor child, the Defendant is responsible for forty percent of said health insurance premium and further responsible for forty percent of all health care costs not covered by insurance.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that should the Defendant, Meryl D. Serr, become employed, that the Defendant be required to procure and maintain health insurance coverage for the minor child, provided said coverage is available or subsequently becomes available through the Defendant's employer or other group carrier, and that the Defendant be required to notify the Department of Social Services of the

insurance companies name, address, policy number and names of persons covered within thirty (30) days and to notify the Department immediately of any change in coverage.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Defendant's current or any subsequent payer of income be directed to withhold amounts from Defendant's income for current or past due support, pursuant to the provisions of SDCL 25-7A-23.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Defendant be required to keep the Department of Social Services informed of his current address, and the name and address of his employer and to provide written notice to the Department of any change in address or employment within seven (7) days of said change taken place.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Defendant's child support obligation shall continue until the minor

child attains the age of eighteen years of age or until said child attains the age of nineteen years, if the child is a full-time student in a secondary school, pursuant to the provisions of SDCL 25-5-18.1.

BY THE COURT:

/s/ Max A. Gors
Circuit Court Judge

ATTEST:

By /s/ Deborah Kaupp
Clerk

APPENDIX J

BON HOMME COUNTY, SOUTH DAKOTA
FIRST JUDICIAL CIRCUIT COURT

STATE OF SOUTH DAKOTA, EX REL
DEBRA LYNN WEIDNER,

Plaintiff,

v.

GERALD TYBUREC,

Defendant.

Mr. Doug R. Kettering, Esq., Special Assistant Attorney General, P.O. Box 203, Yankton, South Dakota 57078, Attorney for the State of South Dakota.

Mr. Gary E. Davis, Esq., Attorney at Law, P.O. Box 149, Gregory, South Dakota 57533, Attorney for Defendant.

MEMORANDUM OPINION

The defendant brings this matter before the court requesting a dismissal be granted in his favor against the Plaintiff urging the matter is barred by a time limitation of the action.

This action was filed by the plaintiff on August 3, 1988, under SDCL 25-8-9, to enforce paternal obligations of the defendant, where

paternity had not yet been previously established. Defendant contends the law in effect on November 25, 1972, the birth date of the child, should control this action. The law[1], in 1982, mandated proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two years from the birth of the child. In light of this two-year limitation, defendant asks this Court to bar plaintiff's cause of action.

Plaintiff resists dismissal of this action based on a 1986 amendment to the 198

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[1]SDCL 25-8-9 Time for bringing proceedings when paternity not previously established "Proceedings to enforce the obligations of the father shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support."

Source: SL 1923, Chpt. 295, § 32; 1931 Chpt. 263; SDC 1939 § Supp 1960, § 37.2(3).

version of SDCL 25-8-9.[2] The 1986 amendment allows proceedings to establish paternity and enforce the obligation of the father be brought any time prior to the child's eighteenth birthday. (Emphasis added.) In addition, it expressly allows such proceedings for all children born since July 1, 1968. Plaintiff seeks retroactive enforcement of the current version of SDCL 25-8-9.

ISSUE

The sole issue before the court is whether SDCL 25-8-9, as amended, can constitutionally revive causes of action

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[2]SDCL 25-8-9 Time for bringing proceedings when paternity not previously established - "Proceedings to establish paternity and enforce the obligation of the father may be brought at any time prior to the eighteenth birthday of the child. The provisions of this section apply to all children who have been born since July 1, 1968.

Source: SL 1932, Chpt. 295, § 32; 1031, Shpt. 263; SDC 1939 & Supp. 1960, § 37.2(3); SL 1983, Chpt. 207, § 2; 1986, Chpt. 218, § 57.

previously barred under time limitations of a prior version of the same statute.

DECISION

State statutes made retroactive and reviving causes of action previously barred are not necessarily unconstitutional. Chase Securities Corporation v. Donaldson, 325 U.S. 304, 65 S.Ct. at 1137, 89 L.Ed. 1628 (1945). In Chase, the court found the revision of a Minnesota state statute lifting the statute of limitations bar in pending litigation did not necessarily violate the Fourteenth Amendment. The Court stated, ". . . it cannot be said that lifting the bar of a statute of limitations so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment. 65 S.Ct. at 1137. The Court further noted, "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation." Id. at

1137. Retrospective application of a state legislative act is valid where the state is seeking a legitimate state interest and due process of law is not obviated.

More specifically, as relates to paternity actions, the United States Supreme Court held a two-year statutory proceeding period for paternity suits to be insufficient and unreasonable. The Court in Pickett v. Brown, 103 S.Ct. 2199 (1983), held a Tennessee proceeding period of two years for paternity suits insufficient. The Court found the time period to be unreasonable for interested parties to have an opportunity to bring suit on behalf of illegitimate children. Id. at 2207. The Court's rationale was threefold: (1) state's interest in preventing increasing welfare rolls; (2) avoidance of logistical obstacles for bringing a suit within a two-year period; and (3) the state's interest in preventing litigation of stale and fraudulent

claims is reduced by the alleviation of proof problems from the advancement in scientific blood testing. Id. at 2208. Accordingly, since South Dakota has the same state interests upheld by the Pickett court, its extension of the proceeding period is valid and not a due process violation.

The North Dakota Supreme Court addressed the same issue raised in this matter during In the Interest of W.M.V. Ohlsen v. J.S., 268 N.W. 781 (1978), wherein, the court upheld retroactive application of a state statute's applicability to a determination of paternity for children born prior to the Act's 1975 effective date. The court stated, "[The statute] is to be applied retroactively, even to the extent of reviving causes of action barred . . . and does not violate the due process clause of the United States Constitution or the North Dakota

Constitution." Id. at 786. The court further reasoned:

> Putative fathers have no vested right in not being made a party to a paternity action. The Obligation of a putative father to support his illegitimate child is a continuing duty . . . the fact that the legislature changes the time in which the paternity of an illegitimate child can be proved does not deprive the putative father of his right to due process of law.

Id. at 786.

The Ohlsen court's reasoning is sound and in line with the rationale behind retrospective application of SDCL 25-8-9 to defendant Youngberg.

It is well-settled law in South Dakota that an amendment to a state statute applies retroactively when the legislature expressly intends it to. Matter of Adams, 329 N.W.2d 882 (S.D. 1983). In Adams, the South Dakota Supreme Court denied retroactive application of a 1981 amendment to a section of the South Dakota unemployment insurance law. The Adam's

court held, "A legislative act will not operate retroactively unless the act clearly expresses an intent to so operate." Id. at 883. (Emphasis added.)

The well-settled holding in Adams applies to the current matter before the court. Here, unlike the law in Adams, it is clear the South Dakota legislature expressly intended retrospective application of SDCL 25-8-9 (1986). The legislature's intent is clear on the face of the statute. The final sentence of Section 25-8-9 states, "The provisions of this Section apply to all children who have been born since July 1, 1968.

CONCLUSION

The United States Supreme Court held in Chase that claims revived by retroactive application of state statutes valid and not necessarily a constitutional due process violation. Also, in Pickett, the Court further held the two-year statutory period for

establishing paternity to be insufficient and unreasonable. Defendant's only argument is that this cause of action is barred by the statute of limitations. This court disagrees.

This court finds the reasoning behind the North Dakota Supreme Court's decision in Ohlsen persuasive and applicable to the issue at hand. Moreover, it is well-settled law in South Dakota that retroactive application of legislative acts are proper when the legislature expressly intends so. Here, it is obvious on the face of the statute that the legislature intended such application.

Therefore, consistent with this decision, defendant's motion to dismiss is denied. Counsel for the plaintiff shall prepare Findings of Fact, Conclusions of Law and an Order consistent with this opinion and serve upon defendant's counsel.

Dated at Yankton, South Dakota, this 3rd day of August, 1989.

/s/ The Honorable Jay H. Tapken
Circuit Court Judge

APPENDIX K

GREGORY COUNTY, SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT COURT

STATE OF SOUTH DAKOTA,
by and through the
DEPARTMENT OF SOCIAL SERVICES,
EX REL GAIL A. DOTSON, in her
own behalf and on behalf of
JARED DOTSON, a Minor Child,

Plaintiff,

v.

MERYL D. SERR,

Defendant.

EXCERPT FROM
STATE'S MEMORANDUM OF LAW

ISSUE #2:

IS THE CURRENT VERSION OF SDCL 25-8-9
TO BE APPLIED RETROACTIVELY?

It is without dispute that Jared Dotson was born on June 6, 1978. At the time Jared turned six, to wit: June 6, 1984, the following statute of limitations was in force:

> **Time for bringing proceedings when paternity not previously established.** Proceedings to enforce the obligation of the father may not be brought after the lapse of more than six years from the birth of the

> child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support.

That version is found in the parent volume for South Dakota Codified Laws, Volume 9A. The next amendment to SDCL 25-8-9 became law on July 1, 1986. That amendment stated as follows:

> **Time for bringing proceedings.** Proceedings to establish paternity and enforce the obligation of the father may be brought at any time prior to the eighteenth birthday of the child. The provisions of this section apply to all children who have been born since July 1, 1968.

At the time that version became law on July 1, 1986, Jared was six years old, having attained that age the prior month.

The current version of SDCL 25-8-9 which took effect on July 1, 1989, reads as follows:

> **Time for bringing proceedings.** Proceedings to establish paternity and enforce the obligation of the father may be brought at any time before the eighteenth birthday of the child.

The State incorporates herein a certain Memorandum Decision issued by the Honorable J. H. Tapken, Circuit Court Judge of the First Judicial Circuit, in a decision rendered by him on August 3, 1989. The State points out Judge Tapken's citation to W.M.V. Olsen v. J.S., 268 N.W.2d 781 (North Dakota 1978). The statute which took effect on July 1, 1986, clearly stated that it was to apply to all children born since July 1, 1968. That was a clear statement from the legislature indicating that it was to have retroactive effect. In other words, on its application date, all illegitimate children born within eighteen years fell within its gamut. Given the language of all three statutes, it can be impliedly determined that the legislative intent was for SDCL 25-8-9 to be considered retroactive. The North Dakota court stated, "the proper rule is that the law in effect at the time of the child's birth is applicable in

paternity actions unless the legislature manifests an intention to the contrary." Id., at page 785. The North Dakota court found that intention and further supported the "general proposition that acts dealing with the determination of paternity can be applied to children born prior to the effective date of the act." Id., at page 785.

/s/ John D. Jacobsen
Gregory County State's Attorney

APPENDIX L

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

NO. 18058

STATE OF SOUTH DAKOTA, by and through the DEPARTMENT OF SOCIAL SERVICES, EX REL GAIL A. DOTSON, in her own behalf and on behalf of JARED DOTSON, a Minor Child,

Plaintiff and Appellees,

vs

MERYL D. SERR,

Defendant and Appellant

Appeal from the Circuit Court
Sixth Judicial Circuit
Gregory County, South Dakota

HONORABLE MAX A. GORS
Presiding Judge

APPELLANT'S BRIEF

. . .

PRELIMINARY STATEMENT

In this brief the Defendant and Appellant, Meryl D. Serr, will be referred to

as "Serr", and the Plaintiff and Appellee, State of South Dakota ex rel Gail a. Dotson, will be referred to as State or State of South Dakota and Gail A. Dotson will be referred to as Dotson. Reference to the settled record will be by parentheses ( ).

JURISDICTIONAL STATEMENT

This is an appeal by Serr, the above-named Defendant and Appellant, from the Second Amended Judgment of Paternity and Order of Support dated July 8, 1992. Appellants filed his Notice of Appeal on September 9, 1992 (144). The jurisdiction of this court is involved pursuant to SDCL § 15-26A-3(1).

On September 9, 1992, Serr served and filed his Appellant's Docketing Statement (145-174) and on September 9, 1992, Serr also served and filed an Undertaking on Appeal 175-177.

LEGAL ISSUES

1. Do the aims and purposes of a statute of limitations involving paternity proceedings protect defendants such as Defendant and Appellant, Meryl Serr?

Trial Court: Held in the negative.

2. Does an amendment enlarging a statute of limitations apply to causes of actin which previously have been barred by the prior statute?

Trial Court: Held in the negative.

3. Was the Defendant and Appellant Meryl Serr denied due process of law and the equal protection as guaranteed by the 14th Amendment to the Constitution of the United States and/or the Constitution of the State of South Dakota by the revival of a cause of action already barred?

Trial Court: Held in the negative.

STATEMENT OF THE CASE AND FACTS

CASE HISTORY

This is a paternity action brought by the State of South Dakota, ex rel. Gail A. Dotson against Meryl Serr alleging that the Defendant Meryl Serr is the biological father of a minor child, Jared Dotson. The complaint seeks relief in addition to the request for a determination of paternity and requests that Defendant Meryl Serr be required to pay child support arrearage from the date of birth of the minor child and to pay future child support for said child until the minor reaches the age of majority. (2,3,4)

This action was commenced by the service of a Summons and Complaint on May 17, 1991 (21).

By Motion dated June 14, 1991, Serr moved to dismiss the action raising the statute of limitations as a defense and alleged that the Gregory Country Circuit Court was without

jurisdiction to hear the action (22-23). Following a hearing held before the trial court on July 27, 1991, the trial court entered Findings of Fact and Conclusions of Law (46-50) and an Order denying Serr's motions to dismiss (44).

Thereafter the case proceeded through discovery and a trial to the Court was heard on April 20, 1992. Following the Court trial Findings of Fact and Conclusions of Law were entered (105-110) and a Judgment of Paternity and Support (111-112). This Judgment of Paternity and Support which appears in the Clerk's records (111-112) determined Meryl Serr to be the biological parent of Jared Dotson. The document provided that the Court should later set the amount of child support and enter judgment in favor of the Plaintiff and against the Defendant in the amount of $2,090.00. A second Judgment of Paternity and Support which appears at page 113 and 114 of

the Clerk's record, differs in substance from the Judgment of Paternity and Support filed at page 111 and 112 only in that it omits a judgment amount.

On June 12, 1992, further proceedings were heard before the Trial Court for the purpose of establishing the amount of financial support following such hearing, the Court entered additional Findings of Fact (123-127 inclusive) and entered an Amended Judgment of Paternity and Judgment of support (128-129 inclusive). The Court additionally entered a separate Findings of Fact and Conclusions of Law (130-133 inclusive) and a separate Judgment for Costs (134). Notice of Entry was given on June 29, 1992, Mr. Serr appealed.

Still later the court entered a Second Amended Judgment of Paternity and Order of Support (139-141 inclusive), which document is dated July 8, 1992. Notice of Entry of Second

Amended Judgment and Paternity for Support was served by mail on Serr's counsel on July 9, 1992. The Notice of Appeal followed and was served by mail. On September 9, 1992, the Notice of Appeal, Docketing Statement were filed and served by mail (178).

STATEMENT OF FACTS

The facts which are relevant to this appeal are undisputed. On June 6, 1978, Gail A. Dotson gave birth to a son, Jared Dotson. The birth occurred in the State of Pennsylvania. Some thirteen years later on May 17, 1991, Gregory County Sheriff Damon Wolf served copies of a Summons and Complaint upon Meryl Serr, which initiated this paternity action (21). According to the written testimony of Plaintiff Gail Dotson no action had been previously taken to judicially determine the paternity of Jared Dotson (11). (See Question #13 at Page 11 of the Clerk's record) Additionally, the confidential

paternity questionnaire which was executed by Gail A. Dotson as complainant indicated that she (Dotson) did not know whether the Defendant believed he was the father of the child. The undisputed facts show that Serr had no knowledge of the paternity claim now asserted until shortly prior to the commencement of the present action, that he never acknowledged Jared Dotson as his son and never furnished any support.

It is undisputed that at the time Jared Dotson was born (June 6, 1978) SDCL 25-8-9 provided

> "proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of the support".

Thus, under the facts of this case, a cause of action for paternity became barred in June of 1980.

ARGUMENT AND AUTHORITIES

Due to the close relationship of the legal issues, the discussion and argument of all points in contained under this heading.

Is it constitutionally permissible to give retrospective application to legislative acts so as to revive causes of action previously barred.

Generally, retroactive legislation, even when permissible, is not favored. Claridge Apts. Co. vs C.I.R., 323 U.S. 141, 65 S.Ct. 72, at 185, 89 L.Ed. 139 (1944). In Chase Securities Corp. vs Donaldson, 325 U.S. 304, 65 S.Ct. 1137 (1945), the United States Supreme Court stated that the Fourteenth Amendment "does not make an action of state legislation void merely because it has some retroactive application. What it does forbid is the taking of life, liberty, or property without due process of law." Chase, at 1143.

A statute which attempts to revive or reinstate a cause of action that is barred is constitutionally objectionable because a retroactive extension of a period of limitation after its expiration amounts to a taking of property without due process of law. Hasse vs Sawicki, 121 NW2d 876, at 878 (WI 1963). The State's claim in this action was barred for more than ten years before an attempt was made to bring suit. Nevertheless, Serr is now faced with the possibility that he could be required to pay back child support substantial costs, and support until Jared Dotson attains the age of majority (139, 140, 141). Thus, under the particular facts of this case by allowing the current version of SDCL 25-8-9 to be applied retroactively to this stale claim, Serr's due process rights have been violated.

> "It is well settled and a fundamental rule of statutory construction, variously stated, that

> all statutes are to be construed as having only a prospective operation, and not as operating retrospectively. It is equally well settled as a fundamental rule of statutory construction supported and established by numerous judicial decisions that statutes are not to be construed as having a retroactive effect." 82 CJS § 414 (emphasis added)

Statutes of limitation, when viewed as procedural or remedial in nature are not excluded from the presumption of perspective application; especially where retroactive operation would impair contract obligation or disturb vested rights. 82 CJS Statute § 416. There is case authority to support the contention that once a statute of limitation has run, the party relying on the statute has a vested property right to the statute of limitation defense, and novel (new law) which changes the period of limitation can not be applied retroactively to extinguish the right. Pulchinski vs Strand, 276 NW2d 781, at 783 (WI

1979); Lak vs Richardson-Merrell, Inc., 302 NW2d 483 (WI 1981).

The history of the governing statute of limitation in this case, SDCL 25-8-9 reveals that the statute has undergone substantial change since the birth of Jared Dotson in 1978. The 1960 version of SDCL 25-8-9 (which was in effect in 1978) operated to bar paternity actions which were not brought within two years after the birth of the child, with exceptions which are not relevant to this case (Source: SL 1923, Ch. 295, §321 1931, Ch. 263; SDC 1939 and Supp. 1960, § 37.2(3)).

The 1983 amendment extended the statutory period of limitations from 2 years to 6 years from the birth of the child. (Source: SL 1923, Ch. 295, § 32; 1931, Ch. 263; SDC 1939 & 1960 Supp., § 37.2(3); SL 1983, Ch. 207, § 2) However, retroactive application of even this more generous statute would bar the state's claim.

The constitutionality of retroactive application of the statute in question (SDCL 25-8-9) is untested in South Dakota. Several other jurisdictions have dealt with similar issues and the results are widely varied, due in part to variations in statutory language, jurisdictional precedent and the like. It is patently unfair to attempt to apply case law from another jurisdiction to the instant case without first examining the statutory construction of those particular statutes from distant jurisdictions. For example, in the trial court below the state relied heavenly on the Supreme Court decision in the case of Pickett vs Brown, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983).

A cursory reading of the Pickett case reveals that the two year statute of limitations involved in Pickett presented very different considerations for the United States Supreme Court than the two year statute of

limitation which was in effect in South Dakota at the time of Jared Dotson's birth. The statute under consideration in the Pickett case, Tenn. Code Annotated § 36-224(2), provided that:

> "A paternity and support action must be filed within two years of the child's birth unless the father has provided support or has acknowledged his paternity in writing or unless the child is, or is liable to become a public charge, in which the case the state or any person can bring suit at any time prior to the child's 18th birthday." Pickett at 2000 (emphasis added)

The Supreme Court held that this statute was unconstitutional because "some children in Tennessee were being treated differently from and less favorably than, legitimate children." Id. at 2206 (emphasis added). Thus, this holding would be inapplicable to the South Dakota two year statute of limitations as it does not contain the preferential language which was violative of the equal protection clause in the Pickett case. See SDCL 25-8-9

(1960). Other Court's of other states have allowed for the retroactive application of statute of limitation under certain circumstances. For example in New Hampshire, the statutory period allowed for the bringing of paternity action from one to two years after the birth of the child would be applied where the one year period had not expired on the effective date of enlargement. State vs Preston, 409 AT2d 792 (NH 1979).

More importantly, the Supreme Court has noted,

> "Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice of hardship' by holding of non-retroactivity". Cipriano vs City of Houma, 395 U.S. 701, 89 S.Ct. 1897, at 1900, 23 L.Ed.2d 647 (1969).

The "lurking problems" of proving paternity have been frequently recognized by the Supreme Court. Parhma vs Hughes, 441 U.S.

347, 99 S.Ct. 1742, at 1748, 60 L.Ed. 2d 269 (197); Lalli vs Lalli, 429 U.S. 259, 99 S.Ct. 518 at 525, 58 L.Ed.2d 503 (1978); Gomez vs Perez, 409 US 535 93 S.Ct. 872, at 875; 35 L.Ed. 2d 56 (1973). Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy than others. Trimble vs Gordon, 430 US 162, 97 S.Ct. 1459 at 1466, 52 L.Ed.2d 31 (1977).

It is important to recite and keep in mind the primary purpose of enacting a statute of limitation in paternity proceedings, for it would seem to have special operation in this case. Statutes of limitation are designed primarily to protect persons from the burden of litigating stale claims. Servomation Corp. vs State Tax Commission, 400 N.Y.2d 887 (N.Y. 1977). It may be argued that in some cases such a bar works a rather harsh result. A recent decision has set forth three reasons why a change in the law, either by statute or

case law, should not revive claims otherwise barred by a statute of limitations.

> "First the rule encourages people to bring suits to change a rule of law with which they disagree, fostering growth and preventing legal stagnation.
>
> Second, the statute of limitation is not solely a punishment for slow plaintiff's, but also serves the important function of repose by allowing the defendants to be free from sale litigation.
>
> Third, a contrary rule would allow virtually unlimited litigation every time precedent changed." Cite, Jolly vs Eli Lilly & Co., 751 P2d 923 (CA 1988).

Statutes of limitations are primarily designed to assure just treatment to defendants, promoting fair treatment by preventing surprises through the revival of stale claims, where evidence has been lost, memories have dimmed, and witnesses have disappeared. Cite, Order of Railroad Telegraphers vs Railway Express Agency, 321 US 342, 64 S.Ct. 582, 88 L.Ed. 788 (1944).

> "The theory is . . . that the right to be free of stale claims in time comes to prevail over the right to prosecute them." Id. at 586.

The Supreme Court has recognized that the power of repose expressed in the statute of limitations may be outweighed where the interest of justice requires vindication of the plaintiff's rights,

> "As where a plaintiff has not slept on his rights but rather has been prevented from asserting them." Burnett vs New York Central Railroad Co., 380 US 424, 85 S.Ct. 1050 at 1054, 13 L.Ed. 2d 941 (1965).

That is not the case here. In the case at bar, some 13 years have passed since the birth of Jared Dotson. Serr is at a marked disadvantage to defend against claims brought from the murky past which are based upon allegations which are claimed to have occurred in the State of Nevada in September or October of 1977. It should be noted that except for the fact that Serr now lives in South Dakota there is absolutely no connection between the

State of South Dakota and this proceeding whatsoever, no witnesses (except Serr) live in the State of South Dakota and none of the actions which allegedly give rise to this cause of action occurred in this state. It is interesting to note that SDCL 25-8-9 when amended in 1989 deleted that portion of the statute which specifically allowed for its retroactive application. Thus, SDCL 25-8-9 currently read as follows:

> "Proceedings to establish paternity and enforce the obligation of the father may be brought anytime before the 18th birthday of the child.

The South Dakota Supreme Court recognizes the generally accepted principle that statutes will generally be held to operate perspectively unless the purpose and intention of the legislation to give them a retroactive effect clearly appears. State vs Westling, 81 SD 34, 130 NW2d 109 at 111 (1964).

Therefore, the most recent amendment (1989) to the statute is not without significance. The legislative intent to avoid retroactive application of SDCL 25-8-9 seems clear; the 1989 amendment deleted that portion of the statue which authorized retroactive application. Thus the clarity of the legislative intent to have this statute apply retroactively has been significantly diminished and eroded, if not totally destroyed by the conspicuous absence of any language directing retrospective application. It is the contention of Serr that one of the purposes of a specific statute of limitations is to protect him from protracted fear of litigation. In that regard, 51 Am Jur 2d, Limitation of Actions, § 17, page 602, provides in party as follows:

> "Thus, while one of the purposes of the statutes of limitation is to relieve a court system from dealing with 'stale' claims, where the facts in dispute occurred so long ago that

> evidence was either forgotten or manufactured, there is another element of a more substantive character in the protection of the potential defendants from protracted fear of litigation."

This principle is further recognized in 51 Am Jur 2d, Limitation of Actions, § 17, page 602, which provides in part as follows:

> "Nevertheless, there is at least one element of substantive nature in the operation of a limitation statute, and that is the protection of potential defendants from the protracted fear of litigation. And there is now a tendency generally to hold that where actual or practical access to the courts is presented, the distinction between so-called substantive and procedural statutes of limitation may be disregarded."

The foregoing principle has been acknowledged by the federal courts and is a part of our system of jurisprudence insofar as due process is concerned. The Court's attention is called to the 1962 case of Pearson vs Northeast Airlines (USCA, 2C) 309 F2d 553, 92 ALR2d 1162, wherein the Court of Appeals stated as follows:

> "It is true that one of the purposes of the statute of limitations is to relieve a court system from dealing with 'stale' claims where the facts in dispute occurred long enough ago that evidence is either forgotten or manufactured. But the wide variety of statutory periods cannot be explained solely on the basis of stale evidence. There is no doubt another element, of a more 'substantive' character, which might be described as a concern for the interests of the potential defendant."

CONCLUSION

It is respectfully submitted that the cause of action raised by the State on behalf of Jared Dotson has been long barred by the statute of limitations. It is respectfully submitted that the judgment in this case should be reversed and the complaint dismissed.

Dated this 22nd day of October, 1992.

/s/ Wally Eklund
Attorney for Appellant

Appendix M

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

NO. 18058

STATE OF SOUTH DAKOTA, by and through the DEPARTMENT OF SOCIAL SERVICES, EX REL GAIL A. DOTSON, in her own behalf and on behalf of JARED DOTSON, a Minor Child,

Plaintiff and Appellees,

vs

MERYL D. SERR,

Defendant and Appellant

Appeal from the Circuit Court
Sixth Judicial Circuit
Gregory County, South Dakota

HONORABLE MAX A. GORS
Presiding Judge

APPELLEE'S BRIEF

---

* * * *

LEGAL ISSUES

1. CAN A LEGISLATURE REVIVE A CAUSE OF ACTION FOR PATERNITY BY GIVING THE STATUTE OF

LIMITATIONS RETROACTIVE EFFECT, WITHOUT DENYING A PUTATIVE FATHER DUE PROCESS OF LAW AND EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

Trial court held in the affirmative.

2. DOES THE CURRENT VERSION OF SDCL 25-8-9 HAVE RETROACTIVE APPLICATION?

Trial court held in the affirmative.

STATEMENT OF THE CASE AND FACTS

Gail A. Dotson (mother) and Jared Dotson (child) reside in Erie County, Pennsylvania. Jared Dotson was born on June 6, 1978 (6-16). This action was commenced by personal service of a summons and complaint upon Serr on the 21st day of May, 1991, at Gregory, Gregory County, South Dakota (21). Such action was commenced under the provisions of the Uniform Revised Reciprocal Enforcement of Support Act.

Serr's statement of facts incorrectly recite that the State was requesting child

support arrearages from the date of Jared's birth. In actuality, the State's complaint alleges that Gail A. Dotson was receiving public assistance from and after December 6, 1989. The State has made no request, nor has it attempted to collect arrearages prior to December 6, 1989.

After trial, the Circuit Court for Gregory County, South Dakota, the Honorable Max A. Gors, issued a Second Amended Judgment of Paternity and Order for Support and ruled that Serr was the biological father of Jared Dotson and responsible for financial support.

ARGUMENT

ISSUE #1: CAN A LEGISLATURE REVIVE A CAUSE OF ACTION FOR PATERNITY BY GIVING THE STATUTE A LIMITATIONS RETROACTIVE EFFECT, WITHOUT DENYING A PUTATIVE FATHER DUE PROCESS OF LAW AND EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

Serr's basic argument is that applying SDCL 25-8-9 retroactively denies him Due Process of Law and Equal Protection as guaranteed by the Fourteenth Amendment to the Constitution of the United States and the State of South Dakota. Serr seems to rely heavily on Wisconsin authority for his proposition by arguing, "[a] statute which attempts to revive or reinstate a cause of action that is barred is constitutionally objectionable because a retroactive extension of a period of limitation after its expiration amounts to a taking of property without due process of law." (Serr Brief, Page 5). Serr cites to the Wisconsin case of Hasse vs. Sawicki, 121 NW 2d 876 (WI 1963) for this proposition. However, a closer reading of Hasse would indicate that Wisconsin is within the minority of jurisdictions that considers the running of a statute of limitations to extinguish a plaintiff's fundamental rights to

bring an action as well as extinguishing the plaintiff's remedy by pursuing the action. As Hasse further stated,

> There is a division of authority with respect to whether a legislature may constitutionally revive a tort action, which has become barred by a statute of limitation, by thereafter enlarging the limitation period and applying it retrospectively as was attempted in the instant case. . . .An analysis of the cases discloses that the different result turns on whether the applicable statute of limitation is construed to extinguish the right or merely the remedy. This Court, by a long line of cases, has followed the construction that our statute of limitations extinguishes the right as well as the remedy. (citations omitted).

Id., at 879. Thus, Wisconsin draws no distinction with respect to the application of its limitation statutes. There is a difference of opinion among various jurisdictions as to whether the running of a statute of limitations operates to extinguish a party's substantive right to pursue a claim

or merely extinguishes that party's remedy. Most authorities hold, and the general rule is, that a statute of limitations operates only on the remedy that can be pursued and does not extinguish a party's substantive right on the claim. 51 Am Jur 2d, Limitation of Actions, § 22, p.606. Am Jur 2d specifically points out Wisconsin as being one of those jurisdictions within the minority of states that takes the view, "that the running of a statute of limitations not only extinguishes the remedy to enforce a right but also destroys the right itself." Id., at page 607. Thus, even with respect to denial of Due Process claims, such as Serr's, even Wisconsin recognizes that such claims lose their validity if a State views its particular Statute of Limitation as being remedial.

Hasse involved a wrongful death claim and an examination of Wisconsin's limitation period for tort. In the case of R.W.L. vs.

Bartholomew, 341 NW 2d, 682 (WI 1984), Wisconsin appears to have taken a quite different approach with respect to paternity proceedings. In Bartholomew, the State has previously commenced a paternity action in 1978 concerning a minor child who had been born in 1970. The County Court dismissed the 1978 action, as Wisconsin's five-year statute of limitation period had run. In 1982 the child's guardian ad litem pursued a second paternity action against the alleged father. The Court upheld the Circuit Court's denial of the father's motion to dismiss and stated that since Wisconsin's statute specifically did not give the child a cause of action, such statute was unconstitutional. Id., at page 686. The Court held that the child had a good cause of action, as Wisconsin had in 1981 (eleven years after the birth of the child) adopted a nineteen-year statute of limitations for

paternity cases. Id., at 688. Interestingly enough, Bartholomew stated,

> In more recent years society has come to recognize that the primary interest in the paternity action is that of the child. . . . Implicit in the Wisconsin statutes relating to paternity and financial support for children (whether born in or out of wedlock) is a recognition of a child's judicial enforceable right vis-a-vis the father to establish parentage and to obtain financial support. Id., at 685. (citations omitted).

Thus, it would appear that even Wisconsin now recognizes that paternity actions and more importantly, the applicable statute of limitations for bringing paternity actions, should primarily recognize the interest of the minor child. The State, the mother and the child all have verifying interests in establishing parentage. Since the child should be deemed to have the primary interest in establishing parentage, a statute of limitation authorizing the child to establish parentage, at least until the child reaches

the age of majority, should, as a matter of public policy, be applied retroactively.

Equal Protection rights concerning a child's interest should be paramount to a putative father's claim of denial of due process, by applying SDCL 25-8-9 retroactively. This concept was long ago recognized by the United States Supreme Court in the case of Chase Securities Corp., v Donaldson et al., Executors, 325 U.S. 304 (1945). Chase Securities, dealt with a Minnesota statute of limitations affecting the state's Blue Sky Laws. Chase Securities quoted its early holding in Campbell vs. Holt, 115 U.S. 620 by stating

> [i]n Campbell vs. Holt, supra, this Court held that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant

of the statutory bar. Chase Securities, supra, at 311 & 312.

Chase Securities rationalized this concept by explaining the primary purpose behind statute of limitations.

> Statues of limitation find their justification in necessity and convenience rather than in logic. They represent expedience, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. . . .They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control. This Court, in

> Campbell v. Holt, adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights (citations omitted).

Id., at page 314.

In the case of Clark v Jetter, 486 U.S., 456 (1988), our Supreme Court was asked to determine the constitutionality of Pennsylvania's six-year statute of limitations on paternity actions. The facts indicate that in 1983 the mother filed a claim for support against Jetter concerning a child born in 1973. The trial court granted Jetter his motion to dismiss based upon the running of Pennsylvania's six-=year statute of limitations. Clark appealed to the Pennsylvania Supreme Court, arguing that the six-year statute of limitations was unconstitutional under the Equal Protection and Due Process clauses of the Fourteenth Amendment. Interestingly enough, prior to the

Pennsylvania Supreme Court hearing Clark's appeal, the Pennsylvania legislature enacted an eighteen year limitation action on paternity cases. The Pennsylvania Supreme Court, however, decided that the new eighteen-year statute did not apply retroactively and affirmed the lower court.

In examining Clark's Equal Protection argument, Jetter applied an intermediate scrutiny standard on the discriminatory classification of illegitimacy. Id., at 461. In applying this standard in the context of paternity actions, the Court recognized that in the case of Mills v. Habluetzel, 456 U.S., 91 (1982), it established the following framework.

> First, the period for obtaining support. . . must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's

> interest in avoiding the litigation of stale or fraudulent claims."

Id., at 462. Serr argues that the 1978 version of SDCL 25-8-9 should apply because the state and its citizenry need to be protected from, "the burden of litigating state claims". (Serr Brief p. 9). Speaking on this issue, Jetter held Pennsylvania's six-year statute of limitations unconstitutional and stated, "[w]e are, however, confident that the six-year statute of limitations is not substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims." Id., at 464.

Jetter pointed out that there were other circumstances where Pennsylvania permitted paternity actions to be litigated more than six years after birth. Quoting Pennsylvania's statute, Jetter commented on the fact that an action would be maintained after six years if the putative father had provided support.

Id., at 464.[1] Other factors relied on by Jetter which mitigated Pennsylvania's claim to a legitimate state interest, were Pennsylvania's intestacy statute; the fact that there was no limitation on the right of the father to establish paternity; the tolling of the general statute of limitations on civil actions during a child's minority and the fact that Pennsylvania adopted an eighteen-year statute to conform to the Federal Child Support Enforcement Amendments passed by Congress in 1984. Id., at 464 and 465. Concerning the passage of the Child Support Enforcement Amendments by Congress in 1984, Jetter commented that Congress recognized a State's interest in avoiding stale and fraudulent claims but also, "recognized that

---

[1]Similarly, South Dakota statutes in effect in 1978 also allowed an action to be brought after six years, if paternity had "been acknowledged by the father in writing or by the furnishing of support." SDCL 25-8-9 (June 6, 1978).

increasingly sophisticated tests for genetic markers permit the exclusion of over 99% of those who might be accused of paternity, regardless of the age of the child." Id., at 465.[2] See also Pickett v. Brown, 103 S. Ct. 2199 (1983), where the Supreme Court struck down Tennessee's two-year statute and stated,

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong doing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as an unjust - way of deterring the parent. Courts are

---

[2]An issue raised, but not properly before the Jetter Court, was a federal pre-emption claim made by Clark. Clark argued that the Federal Child Support Enforcement Amendments (now adopted in South Dakota) required states to adopt retroactive eighteen-year statutes of limitations or their equivalent. Jetter, 460.

> powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does unable us to strike down discriminatory laws relating to status of birth where - as in this case - the classification is justified by no legitimate state interest, compelling or otherwise.

Id., at 2203 & 2204.

Serr argues that applying SDCL 28-8-9 retroactively would deny him Due Process of law guaranteed under the Fourteenth Amendment by subjecting him to support obligations which would not have been enforceable had the eighteen-year statute not been passed. Serr argues on page five of his brief that the Fourteenth Amendment forbids, "the taking of life, liberty, or property without due process of law." Serr's explanation of the due process requirements is only partially correct. Blacks Law Dictionary 5th Ed., quoting from Babineaux vs. Judiciary Commission, 341 SO 2d 396, (La.) defines substantive due process as "[s]uch may be

broadly defined as the constitutional guarantee that no person shall be arbitrarily deprived of his life, liberty or property; the essence of substantive due process in protection from arbitrary and unreasonable action." Id. (emphasis added). Thus, the issue in the case at bar, could more properly be framed to be; would giving SDCL 25-8-9 retroactive application, be unreasonable and arbitrary.

* * * *

CONCLUSION

Applying the current version of SDCL 25-8-9 retroactively does not deny putative fathers due process of law or equal protection, as the rights of an illegitimate child should always be paramount. Statutes of limitations are a matter of legislative grace, and one may only have protection of that grace while a particular statute is in effect. Because South Dakota views its statutes of

limitations to be remedial and are subject to legislative control and represent public policy, Serr has no fundamental right to claim a denial of due process.

Respectfully submitted at Burke, South Dakota.

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Supreme Court, U.S.
FILED
FEB 4 1994
OFFICE OF THE CLERK

No. 93-1091

In The

Supreme Court of the United States

October Term, 1993

STATE OF SOUTH DAKOTA, BY AND THROUGH THE DEPARTMENT OF SOCIAL SERVICES EX REL. GAIL A. DOTSON, IN HER OWN BEHALF AND ON BEHALF OF JARED DOTSON, A MINOR CHILD,

Petitioner,

v.

MERYL D. SERR,

Respondent.

On Petition For Certiorari To The Supreme Court Of The State Of South Dakota

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether This Court Should Consider A Constitutional Issue Not Raised Before Or Decided By The South Dakota Courts When The Question Raised Is Not One Which Presents An Important Federal Question?

II. Whether the South Dakota Supreme Court's Holding In *State v. Serr* Conflicts With Any Decisions Of This Court?

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JURISDICTIONAL STATEMENT

The Respondent suggests that jurisdiction by this Court can not be evoked pursuant to the provisions of 28 U.S.C. § 1257(a).

Specifically, the Respondent disputes that the present issue is properly before this Court as it was never presented or argued to either the South Dakota trial court or the South Dakota Supreme Court and, therefore, the state courts were not afforded a fair opportunity to address the federal question that is sought to be determined here. Additionally, the Respondent urges that, respectively, the present issue does not raise an important federal question.

SUMMARY OF THE ARGUMENT

The Respondent, Meryl Serr, respectfully prays that this Court deny the State of South Dakota's petition for a writ of certiorari in the matter of *State of South Dakota ex rel. Dotson v. Serr*, 506 N.W.2d 421 (S.D. 1993) [hereinafter *State v. Serr*], a judgment and opinion issued by the Supreme Court of the State of South Dakota on October 6, 1993.

The Respondent contends that review of this opinion is not proper because jurisdiction pursuant to 28 U.S.C. § 1257 is not established where the South Dakota state courts did not have a fair opportunity to address the constitutional question sought to be reviewed and where the record establishes that the question raised is not, relatively, an important issue of federal concern. The

Respondent alternatively asserts that the South Dakota Supreme Court's holding in *State v. Serr* does not conflict with any prior decision of this Court.

STATEMENT OF THE CASE

A. Relevant Statutory Provisions

A wholly discretionary statute, 28 U.S.C. § 1257(a) provides in relevant part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States.

In addition, South Dakota law regarding the appropriate scope of review in its appellate system is relevant here. Pursuant to South Dakota's rules of appellate procedure, parties seeking review in the South Dakota Supreme Court shall provide to the court:

> a concise statement of the legal issue or issues involved, omitting unnecessary detail. Each issue shall be stated as an appellate court would state the broad issue presented. Each issue shall be followed by a concise statement of how the trial court decided it.

SDCL § 15-26A-60(4). An appellee need not reply to the appellant's statement of the issues " . . . unless the appellee is dissatisfied with the statement of the appellant." SDCL § 15-26A-61.

Additionally, an appellate party may petition for rehearing before the South Dakota Supreme Court within twenty days after a decision:

> The petition shall state briefly the ground upon which a rehearing is asked and the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the printed record and the authorities relied upon.

SDCL § 15-30-4.

Finally, the statutory provision now challenged by the State comes from a version of SDCL § 25-8-9 which was in effect in 1978. At that time, SDCL § 25-8-9 provided as follows:

> Proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support.

(*See* former SDC 1939 § 37.2131)

In 1983, South Dakota amended this statute to read as follows:

> Proceedings to enforce the obligation of the father may not be brought after the lapse of more than six years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support.

(1983 S.D. Sess. L., ch. 207, § 2).

In 1986, SDCL § 25-8-9 underwent further change:

> Proceedings to establish paternity and enforce the obligations of the father may be brought at any time prior to the eighteenth birthday of the child. The provisions of this section apply to all children who have been born since July 1, 1968.

(1986 S.D. Sess. L., ch. 218, § 57).

A final change to SDCL § 25-8-9 was wrought in 1989 when the legislature deleted the retroactive language so that the present South Dakota statute reads as follows:

> Proceedings to establish paternity and enforce the obligations of the father may be brought at any time before the eighteenth birthday of the child.

(1989 S.D. Sess. L, ch. 222).

Salient to this final statutory revision is SDCL § 2-14-21, which addresses the issue of retroactive application of statutes in South Dakota courts. That statute provides:

> No part of the code of laws enacted by § 2-16-13 shall be construed as retroactive unless such intention plainly appears.

B. Opinions Below

The procedural history underlying this paternity action is somewhat lengthy, though not difficult. The State of South Dakota instituted an action for paternity against the Respondent, Meryl Serr, on May 17, 1991 on behalf of a Pennsylvania citizen, Gail Dotson, and her thirteen year-old son. Serr, making a special appearance, moved to dismiss the action based upon a statute of

limitations defense. Following a hearing on the motion on July 27, 1991, the trial court altered its bench ruling and entered Findings of Fact and Conclusions of Law and an Order denying Serr's motions to dismiss. (Petitioner's Appendix, A-21; A-29, A-31)

The matter proceeded to trial on April 20, 1992. At no time was the issue raised by the State in this petition presented to the trial court. The trial court entered its Findings of Fact and Conclusions of Law and a Judgment of Paternity and Support, determining Mr. Serr to be the child's biological father on May 12, 1992. (Petitioner's Appendix, A-32; A-43)

On June 12, 1992, further proceedings were heard before the trial court to establish the appropriate amount of support. Following that hearing, the trial court entered separate Findings of Fact and Conclusions of Law and an Amended Judgment of Paternity and Judgment of Support. (Petitioner's Appendix, A-46; A-54) Notice of Entry was given on June 29, 1992. Mr. Serr appealed.

In the meantime, the trial court entered a Second Amended Judgment of Paternity and Order of Support, dated July 8, 1992. (Petitioner's Appendix, A-58) Notice of Entry of the Second Amended Judgment for Paternity and Support was given on July 9, 1992. Serr renewed his appeal pursuant to South Dakota's appellate procedure, arguing that South Dakota law did not permit retroactive application of statutes absent an express legislative intention.

The matter was briefed and argued to the South Dakota Supreme Court. On October 6, 1993, the South Dakota Supreme Court issued its opinion, reversing the

trial court and holding that the present version of SDCL § 25-8-9 is not retroactive. *State v. Serr*, 506 N.W.2d at 423. Thereafter, the State of South Dakota petitioned this Court for its writ of certiorari to review that judgment on a constitutional issue that it failed to properly present before either of the South Dakota courts. The Respondent, Meryl Serr, respectfully requests that this Court decline the State's petition.

STATEMENT OF THE FACTS

The following facts are not contested. On June 6, 1978, Gail Dotson gave birth to a child out-of-wedlock. From that time to the present, Ms. Dotson and her child have been Pennsylvania residents. According to Ms. Dotson, she became pregnant while living in Nevada in 1977, where she became acquainted with the respondent, Meryl Serr, and began to have sexual relations with him. Ms. Dotson also admits that during this same time-frame, she had intercourse with another man.

For reasons not revealed by this record, Ms. Dotson hesitated some thirteen years before naming a putative father for the child. In 1988 or 1989, she sent a letter with a picture of the child enclosed to Mr. Serr at his South Dakota address, indicating her belief that he was the child's father. The receipt of this belated birth announcement was the first indication Mr. Serr had of either Ms. Dotson's pregnancy or the subsequent birth. Consequently, he had neither been adjudicated to be the father, nor had he acknowledged paternity or offered support for the child.

When Ms. Dotson began to receive Aid to Dependent Children in December, 1989, she applied for child support services under Pennsylvania's Revised Uniform Reciprocal Enforcement of Support Act. Once a Pennsylvania court determined that Mr. Serr could owe a duty of support, a paternity petition was initiated in South Dakota circuit court to establish paternity and compel support on May 17, 1991.

Mr. Serr responded to the paternity complaint by asserting that the statute of limitations to bring the action against him had run. As discussed above, Mr. Serr made a special appearance at a hearing to determine the viability of this defense and the trial court ultimately rejected Mr. Serr's statute of limitations defense,[1] specifically finding that the South Dakota legislature intended the 1989 version of SDCL § 25-8-9 to apply retroactively.

(Petitioner's Appendix, A-21 (Conclusion of Law IV)). Significantly, the equal protection argument now espoused by the State was never presented to the trial court. Thereafter, the paternity/support action proceeded, with the trial court ultimately finding that Mr. Serr was the child's father and that this status obligated him to make support for the child. Mr. Serr timely appealed.

On appeal, the South Dakota Supreme Court reversed, holding that the current version of SDCL § 25-8-9 did not have retroactive application. *Serr*, 506

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[1] The trial court ruled from the bench in favor of Mr. Serr, then reversed its position in a brief letter opinion. (Petitioner's Appendix, A-31)

N.W.2d at 423. Importantly, the South Dakota Supreme Court noted that Dotson did not specifically raise any constitutional issues on her own behalf. The South Dakota Supreme Court did not undertake to pursue that issue for her and, therefore, did not decide that particular question. *Id.* at 423.

REASONS FOR DENYING THE WRIT

I.

This Court Should Not Consider A Constitutional Issue Not Raised Before Or Decided By The South Dakota Courts When The Question Raised Is Not One Which Presents An Important Federal Question.

A. The State Failed To Properly Present The Federal Question It Now Advances To The South Dakota State Courts.

The State of South Dakota now argues at length to this Court that SDCL § 25-8-9, as it was in effect in 1978, violated the Equal Protection Clause of the Fourteenth Amendment. It is respectfully submitted that, as a matter of procedural and appellate propriety, this argument comes too late: neither the South Dakota circuit court nor the South Dakota Supreme Court was ever properly presented with this question.

Because this case comes to this Court from the South Dakota state court, the relevant jurisdictional statute is 28 U.S.C. § 1257. As applied to the circumstances of this case, that statute mandates that in the state courts, the petitioner shall "have specially set up or claimed under

the Constitution . . . of . . . the United States" that right which it now seeks to have this Court enforce. 28 U.S.C. § 1257(a).

Likewise, Supreme Court Rule 14(h) requires each petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court." A review of this record reveals that the petitioner, the State of South Dakota, failed to raise or preserve a claim of violation of the Equal Protection Clause of the Fourteenth Amendment in the South Dakota courts: the question raised here simply was not decided in *State v. Serr*, 506 N.W.2d at 421.

This Court "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed.2d 398 (1969). *See also Webb v. Webb*, 451 U.S. 493, 496, 101 S.Ct. 1889, 1892, 68 L.Ed.2d 392 (1981); *Tacon v. Arizona*, 410 U.S. 351, 352, 92 U.S. 998, 999, 35 L.Ed.2d 346 (1973); *Moore v. Illinois*, 408 U.S. 786, 799, 92 S.Ct. 2562, 2570, 33 L.Ed.2d 706 (1972); *Stanley v. Illinois*, 405 U.S. 645, 658 n.10, 92 S.Ct. 1208, 1216 n.10, 31 L.Ed.2d 551 (1972); *Hill v. California*, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971); *University of California Regents v. Bakke*, 438 U.S. 265, 283, 98 S.Ct. 2733, 2744, 57 L.Ed.2d 750 (1978).

"Questions not raised below are those on which the record is likely to be inadequate since it certainly was not compiled with those questions in mind," *Cardinale*, 394

U.S. at 438, 89 S.Ct. at 1163. The Court's jurisdictional reservation was more fully explained by the Court in a latter case as follows:

> . . . [T]here are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute . . . be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

Webb v. Webb, 451 U.S. at 500, 101 S.Ct. at 1983. These considerations include a respect for the principles of comity[2] as well as practical reasons which permit state courts to exercise their authority to construe state statutes, insure that independent state grounds will be identified and acted upon in an authoritative manner by state courts, and require litigants to adequately prepare and present claims to state courts where the issue may be disposed of in a manner that obviates any reason for unnecessarily consuming the Supreme Court's time and effort. *Webb*, 451 U.S. at 500, 101 S.Ct. at 1894. In short, proper presentation of federal questions in the first

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[2] Historically, the "federal-state comity" policy stems from the exhaustion-of-state-remedies doctrine applicable to federal habeas corpus review of the constitutional claims of state prisoners which has been adhered to as a means to allow state courts the first instance to correct constitutional violations. *See Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971).

instance preserves this Court's resources for cases which are truly ready and important enough to review.

Of course, this rule has never been applied with inflexible specificity. At the very minimum, however, "there should be no doubt from the record that a claim under . . . the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law." *Webb*, 451 U.S. at 500, 101 S.Ct. at 1894.

Consider, for example, the result in *Webb v. Webb*. The Petitioner there sought review of a Georgia Supreme Court decision that she alleged failed to give full faith and credit to a Florida custody decree. *Webb*, 451 U.S. at 493, 101 S.Ct. at 1890. The Court granted a writ of certiorari, only to discover later that the petitioner had not properly presented the issue regarding the application of the Full Faith and Credit Clause of the Federal Constitution to the Georgia courts; instead, the record revealed that the petitioner had merely used the phrase "full faith and credit" at several points in the proceedings below. *Webb*, 451 U.S. at 496, 101 S.Ct. at 1891. Thus, where the Georgia Supreme Court "neglected to pass on the import of the federal Full Faith and Credit Clause," *Webb*, 451 U.S. at 504, 101 at 1897 (MARSHAL, J., dissenting), this Court concluded that it did not have jurisdiction to hear the case due to the petitioner's failure to properly raise the question in the state court proceedings. *Webb*, 451 U.S. at 500, 101 S.Ct. at 1894.

Indeed, that is an immediate distinction between the present petition and the cases cited by the State as supporting authority. In each of those cases, the record demonstrated that the federal question reviewed had initially been appropriately presented to and decided upon by the respective state courts. *See Clark v. Jeter*, 486 U.S. 456, 460, 108 S.Ct. 1910, 1913, 100 L.Ed.2d 465 (1988) (petitioner specifically argued federal constitutional question to lower and appellate state courts); *Pickett v. Brown*, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983) (same); *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982) (petitioner specifically appealed federal constitutional question to state appellate court).

The State does not suggest that it presented the federal question it now raises to the South Dakota trial court. It did not; instead, the State successfully argued there that the present version of South Dakota's paternity statute should be retroactively applied to Mr. Serr's case. (Petitioner's Appendix, A-31) Mr. Serr appealed to the South Dakota Supreme Court upon the argument that retroactive application of the statute violated *his* due process and equal protection rights. (Petitioner's Appendix, A-80) Though South Dakota appellate procedure provided the State with the opportunity to do so, the State merely responded to Mr. Serr's issues and failed to raise any federal constitutional arguments on its own behalf.[3]

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[3] According to the State's own appellate arguments to the South Dakota Supreme Court, these were the sole legal issues to be addressed:

1. CAN A LEGISLATURE REVIVE A CAUSE OF ACTION FOR PATERNITY BY GIVING THE STATUTE OF LIMITATIONS RETROACTIVE

Though South Dakota procedural law also provides appellate parties an opportunity for rehearing where "points supposed to have been *overlooked or misapprehended* by the court" can be brought to the court's attention for reconsideration, SDCL § 15-30-4, the State did not submit a petition for rehearing to the South Dakota Supreme Court before seeking this Court's writ of certiorari.

The State now argues that its constitutional question was "adequately raised below" by implication through citation to three United States Supreme Court decisions in its appellate brief. However, this is an assumption that the record does not bear out. Specifically, the South Dakota Supreme Court's holding in *Serr* was that SDCL § 25-8-9 does not have retroactive effect. *Serr*, 506 N.W.2d at 423. In *dicta*, the *Serr* court expressly stated: "Dotson did not specifically raise any constitutional issues on her own behalf." *Id.* Thus, there was no consideration of the issue by the South Dakota Supreme Court. Indeed, the South Dakota Supreme Court merely noted, without

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> EFFECT, WITHOUT DENYING A PUTATIVE FATHER DUE PROCESS OF LAW AND EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?
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> . . .
>
> 2. DOES THE CURRENT VERSION OF SDCL 25-8-9 HAVE RETROACTIVE APPLICATION?

(*See* Petitioner's Appendix, A-100, 101). South Dakota law requires appellate parties provide to the court "a concise statement of the legal issue or issues involved . . . followed by a concise statement of how the trial court decided it." *See* SDCL § 15-26A-60(4); SDCL § 15-26A-61.

explanation, that the State's facts and citations were distinguishable. *Id.* at 423.

B. The South Dakota Courts Did Not Pass Upon The Constitutional Question Posed To This Court.

Rather than direct the Court's attention to the fact that the present issue was never even identified as an issue before the South Dakota Supreme Court, the State posits that the South Dakota Supreme Court simply rejected the constitutional argument that it now advances. (Petitioner's Brief, p. 10) However, its analysis assumes too much, for it assumes that South Dakota Supreme Court must consider any issues implied by the parties on appeal.

Clearly, the South Dakota Supreme Court is under no obligation to consider issues not properly raised by the parties, whether constitutional in nature or not. Under South Dakota law, failure to properly identify the issues to be considered on appeal is a waiver of all issues not raised, briefed and argued. SDCL §§ 15-26A-60, 15-26A-61. *See Graham v. State*, 328 N.W.2d 254, 255 n.2 (S.D. 1982); *Application of Northwestern Bell Telephone Co.*, 326 N.W.2d 100, 104 (S.D. 1982). Thus, the South Dakota Supreme Court has consistently held that the constitutionality of a statute will not be considered where raised for the first time on appeal. *See e.g., M.S. v. Dinkytown Day Care Center, Inc.*, 485 N.W.2d 587 (S.D. 1992) (equal protection argument raised on appeal by abused minors declined because not presented to trial court); *Sharp v. Sharp*, 422 N.W.2d 443 (S.D. 1988) (refusing to consider

the constitutional question raised at the appellate level where the issue was not thoroughly submitted to the court). *See also Carr v. Core Industries*, 392 N.W.2d 829 (S.D. 1986); *Bayer v. Johnson*, 349 N.W.2d 447 (S.D. 1984); *Mayrose v. Fenrich*, 347 N.W.2d 585 (S.D. 1984).

In addition to specific appellate procedure statutes, the South Dakota Supreme Court has explained its judicial reservation in *Sharp v. Sharp* as follows:

> For an appellate court to consider an issue and make a decision on an incomplete record on questions raised before it for the first time would, in many instances, result in injustice, and for that reason courts ordinarily decline to review questions raised for the first time in the appellate court.

Sharp, 422 N.W.2d at 445. The South Dakota Supreme Court has also noted that this general rule of appellate procedure is not applied where the court is faced with "a compelling case" and where an issue is as "thoroughly" presented to the appellate court as it could have been presented below. *Id.* at 466.

The South Dakota Supreme Court was not convinced that either exception to the general rule applied here. The record does not support a claim that this was a compelling case. For example, the South Dakota courts were never provided with the statistical information the State cites in its present petition and Mr. Serr has had no opportunity to rebut or question the reliability of those numbers. (*See* Petitioner's Brief, pp. 31 n.7) The statistics

advanced by the State, like the lion's share of its arguments, are not a part of the appellate record.[4]

The State also informs this Court that South Dakota will be threatened by the "potential" loss of funding because of its alleged "noncompliance" with the provisions of the Federal Child Support Enforcement Amendments, 42 U.S.C. §§ 601-666 (1988). (Petitioner's Brief, pp. 31-32) Again, there is absolutely nothing on the record to support this bald assertion. The State also failed to raise the question of whether this federal statute preempted state law. *See e.g., Clark v. Jeter*, 486 U.S. at 460, 108 S.Ct. at 1913 (declining to review where petitioner failed to adequately raise claim of federal pre-emption by 42 U.S.C. § 666(a)(5) in lower courts).

Like the petitioner in *Webb v. Webb*, the State of South Dakota can only point out fleeting references to the phrase "equal protection" and passing citations to United States Supreme Court cases. However, South Dakota appellate procedure clearly establishes that one can not raise an appellate issue by mere implication. Moreover, the South Dakota Supreme Court has the authority to determine when an issue has been properly raised before it. Here, the court expressly stated that the State had not properly presented a constitutional issue. *Serr*, 506 N.W.2d at 423. In short, the constitutional question

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[4] Note that if the State believed that the South Dakota Supreme Court had overlooked or misapprehended any argument on the record, it could have petitioned to that court for a rehearing.

SDCL § 15-30-4.

argued here was neither fairly raised before or decided by the state courts.

It is uncontested that the *only* issue raised and addressed in the South Dakota Supreme Court in *State v. Serr* was: "DOES THE 1989 AMENDMENT TO SDCL 25-8-9 HAVE RETROACTIVE EFFECT?" *Id.* The holding in *Serr* was limited to the finding that SDCL § 25-8-9 is not entitled to retroactive effect. *Id.* The *Serr* Court did not determine whether South Dakota's former statute is constitutional: that question remains to be developed, presented to and determined by the lower courts in South Dakota before it can rightfully be decided here.

C. The South Dakota Supreme Court's Holding in *State v. Serr* Does Not Raise An Important Federal Question.

The jurisdictional requisites established by Congress in 28 U.S.C. § 1257 grant recognition to the Supreme Court's "finite time" and allow the Court to judge each potential case on not only its own merits, but against all the other cases seeking the Court's review. *See* 28 U.S.C.A. § 1257, D. Siegel, "Commentary on the 1988 Revision" pp. 96-98 (1993). Review by this Court on a petition for certiorari is a matter of judicial discretion rather than a matter of right; review is granted "only when there are special and important reasons therefor." U.S. Sup.Ct. Rule 10.1.

The State can not, especially given the state of this record, demonstrate a compelling or important reason for this court to review the South Dakota Supreme Court's decision in *State v. Serr*, 506 N.W.2d at 421. It implies,

without any support whatsoever on the record, that several thousand children in South Dakota are going to be harmed – indirectly – by the *Serr* decision. First, the State quotes the Court to statistics that it failed to present to the South Dakota courts and speculates that "approximately 8,600 children, (less, of course, any children who have already somehow established paternity) could be harmed by this decision." (Petitioner's Brief, pp. 30-31).

Aside from the fact that this "evidence" is undisputedly *not* on the record, it is facially misleading. Under the lightest examination, it is revealed as meaningless numbers. By its own admission, the State does not know how many children born out-of-wedlock in South Dakota during the identified time period have already established paternity: it is possible that all of the approximately 8,600 children so generally referred to have established paternity. This record is barren of any sort of reference to the numbers of children who could somehow be affected by the *Serr* decision (whether from South Dakota or elsewhere) and that it is too late for the State to submit that evidence now.

Additionally, the State implies that federal funding for its child support programs is in jeopardy because of its alleged noncompliance with the Federal Child Support Enforcement Amendments.[5] It offers even less support for this unadorned claim – and there is even less evidence to support it. In a word, it is sheer speculation.

This Court should determine the relative importance of this question based upon the actual facts and the

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[5] As noted above, the State also failed to raise the preemption issue regarding the provisions of this federal enactment before the South Dakota courts.

record of the case, not suppositions and belated, unsupported statistical information. The record offers no foundation: the State can not actually claim that even one South Dakota child has been or will be affected by its decision in *Serr*.[6] Perhaps the State's present claim that the *Serr* opinion is of great import to a great number of South Dakota children would carry more credence if the State had petitioned for rehearing on this issue before the South Dakota Supreme Court: it did not. In fact, the state of the record and the State's belated efforts to offer some support for its argument that this is an important federal question only emphasize the fact that this argument was never appropriately presented to the South Dakota courts.

II.

The South Dakota Supreme Court's Holding In *State v. Serr* Does Not Conflict With Any Decisions Of This Court.

A. The South Dakota Supreme Court's Holding That An Amended Statute May Not Be Retroactively Applied Does Not Conflict With Any Decision Of This Court.

To effectively discuss whether this case is an appropriate one for Supreme Court review, the actual holding of *State v. Serr* must be emphasized. Contrary to the

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[6] Ms. Dotson and her child are residents of Pennsylvania. Of course, there remains a question of whether the *Serr* decision affects Ms. Dotson's child where it is uncontested that federal legislation may pre-empt South Dakota state law. *See* 42 U.S.C. § 666(a)(5).

State's position, the South Dakota Supreme Court concluded only that an amended statute may not be retroactively applied so as to revive a cause of action previously barred. *Serr*, 506 N.W.2d at 423.

This Court has long-recognized that retroactive legislation, when permissible, is not favored. *Claridge Apt. Co. v. C.I.R.*, 323 U.S. 141, 65 S.Ct. 72, 89 L.Ed. 139 (1944); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, – L.Ed. – (1945). This basic principle has assumed the proportions of horn-book law. According to one source,

> [i]t is well settled and a fundamental rule of statutory construction, variously stated, that all statutes are to be construed as having only a prospective operation, and not as operating retrospectively. It is equally well settled as a fundamental rule of statutory construction supported and established by numerous judicial decisions that statutes are not to be construed as having retroactive effect.

82 C.J.S. § 414.

Consistent with the general rule, South Dakota law specifically addresses the issue of retroactive application of statutes in South Dakota courts. That statute provides:

> No part of the code of laws enacted by § 2-16-13 shall be construed as retroactive unless such intention plainly appears.

SDCL § 2-14-21. Most state courts which have considered the issue of retroactivity of statutes have held that legislation which attempts to revive previously time-barred claims impermissibly interferes with vested rights of the defendant, and thus violates due process. *State of Minn.*

Ex Rel. Hove v. Doese, 501 N.W.2d 366, 369 (S.D. 1993)(citing a legion of supporting cases)[hereinafter *State v. Doese*].

The history of the statute involved in *Serr* indicates that the statute, SDCL § 25-8-9, has undergone substantial change since the birth of the Dotson child in 1978. At that time, a version of SDCL § 25-8-9 provided as follows:

> Proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support.

In 1983, South Dakota amended the legislation to read as follows:

> Proceedings to enforce the obligation of the father may not be brought after the lapse of more than six years from the birth of the child, unless paternity has been judicially established, or has been acknowledged by the father in writing or by the furnishing of support.

In 1986, SDCL § 25-8-9 underwent further change:

> Proceedings to establish paternity and enforce the obligations of the father may be brought at any time prior to the eighteenth birthday of the child. The provisions of this section apply to all children who have been born since July 1, 1968.

A final change to SDCL § 25-8-9 was wrought in 1989 when the legislature deleted the retroactive language so that the present South Dakota statute reads as follows:

> Proceedings to establish paternity and enforce the obligations of the father may be brought at

> any time before the eighteenth birthday of the child.

It was this latest version of SDCL § 25-8-9 that the South Dakota trial court applied to the facts of the present case, a legal posture which necessarily required the retroactive application of the statute despite the absence of any legislative approval. *Contra* SDCL § 2-14-21.

At the time that *Serr* was appealed, the retroactive application of SDCL § 25-8-9 was untested in South Dakota. In the interim, however, the South Dakota Supreme Court decided *State v. Doese*, 501 N.W.2d at 366. In *Doese*, the South Dakota Supreme Court was presented with a nearly identical factual scenario in a paternity case. As in *Serr*, the State (this time the state of Minnesota) did not urge the pre-emption of federal laws or raise any equal protection claim. *Doese*, 501 N.W.2d at 366 ("Minnesota and Hove did not . . . claim the statute infringes upon Hove's constitutional rights. Rather, they only allege that the 1989 statute can be applied retroactively."). Though the *Doese* Court did come much closer to addressing the constitutional issue,[7] the *Doese* Court also indicated that the barren state of the record made it difficult. *Doese*, 501 N.W.2d at 371. Thus, the *Doese* Court

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[7] In a dissenting opinion, one justice indicated that he believed the equal protection question should have been considered by the majority. *Doese*, 501 N.W.2d at 371 (WUEST, J., dissenting).

Another dissenting opinion indicated that the 1989 version SDCL 25-8-9 should have been considered retroactively effective. *Id.* at 374 (SABERS, J., dissenting).

also declined to pass upon the constitutional muster of SDCL § 25-8-9.[8]

Finally, a comparison between the cases cited by the State in its petition indicate that the holding in *State v. Serr* is not in conflict with this Court's holdings in *Clark v. Jeter* and *Pickett v. Brown*. First of all, both *Clark* and *Pickett* directly address the issue of an equal protection violation.[9] *Clark*, 486 U.S. 460-64, 108 S.Ct. 1914-16; *Pickett*, 462 U.S. 7-19; 103 S.Ct. 2204-08. On the other hand, *Serr* addresses only the retroactive application of SDCL § 25-8-9 and expressly notes that the equal protection argument was not raised by the State. *Serr*, 506 N.W.2d at 426.

The earlier of the two cases, *Pickett v. Brown*, involved an equal protection challenge to Tennessee's former paternity statute. At that time, its statute provided that a paternity and support action must have been filed within two years of the child's birth unless the father had provided support, had acknowledged his paternity in writing or unless the child was, or was liable to become a public charge, in which case the state or any person could bring suit at any time prior to the child's eighteenth birthday. *Pickett*, 462 U.S. at 3 n.1, 103 S.Ct. at 2201 n.1. It was significant that Tennessee's claim that the interest

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[8] No effort was made to seek a writ of certiorari regarding the *Doese* holding – a procedural failure which also suggests against the compelling nature of the present question.

[9] Pursuant to this Court's holding in *Mills v. Habluetzel*, 456 U.S. at 99, 102 S.Ct. at 1554-55, statutes regarding illegitimate children are treated to intermediate scrutiny when analyzed on equal protection grounds.

advanced by the statute was to prevent stale or fraudulent claims was "seriously undermined" by the fact that if the child were likely to partake of public revenue, the statutory period would be readily extended. *Id.* at 15; 103 S.Ct. at 2207. Thus, the Court concluded that the Tennessee statute violated the Equal Protection Clause, noting " . . . some illegitimate children in Tennessee are treated differently from, and less favorably than, legitimate children." *Id.* at 11; 103 S.Ct. at 2206.

In *Clark v. Jeter*, the Court considered an equal protection challenge to a Pennsylvania statute which barred paternity claims with a six year statute of limitations. As in *Serr*, the retroactive application of an amended statute was addressed – and rejected – by the Pennsylvania courts. *Clark*, 486 U.S. at 460, 108 S.Ct. at 1913. However, there the equal protection argument had clearly been properly raised in the state courts. *Id.*

Upon review, the *Clark* Court outlined the requisites of a statute of limitation for paternity actions:

> First, the period for obtaining support . . . must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed upon that opportunity must be substantially related to the State's interest in avoiding the litigation of state or fraudulent claims.

Id. at 460, 108 S.Ct. at 1914. The *Clark* Court held that Pennsylvania's statute of limitations violated the Equal Protection Clause, adding that "even six years does not necessarily provide a reasonable opportunity to assert a

claim on behalf of an illegitimate child." *Id.* Note, however, that *Clark* was not decided on that conclusion:

> We do not rest our decision on this ground, however, for it is not entirely evident that six years would necessarily be an unreasonable limitations period for child support actions.

Id. at 464, 108 S.Ct. at 1915.

The primary purpose in enacting a statute of limitations in paternity actions is to protect persons from the burden of litigating stale or fraudulent claims. The "lurking problems" of proving paternity have been frequently recognized by this Court. *Parham v. Hughes*, 441 U.S. 347, 355, 99 S.Ct. 1742, 1748, 60 L.Ed.2d 269 (1979); *Lalli v. Lalli*, 429 U.S. 259, 265, 99 S.Ct. 518, 523, 58 L.Ed.2d 503 (1978); *Gomez v. Perez*, 409 U.S. 535, 538, 93 S.Ct. 872, 874, 35 L.Ed.2d 56 (1973). Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy than other. *See Trimble v. Gordon*, 430 U.S. 762, 771, 97 S.Ct. 1459, 1466, 52 L.Ed.2d 31 (1977).

The State correctly asserts that scientific methods of blood testing now make a state's interest in avoiding stale and fraudulent claims more attenuated. *See e.g., Clark*, 486 U.S. at 465, 108 S.Ct. at 1916 (citation omitted) (recognizing that "increasingly sophisticated tests for genetic markers permit the exclusion of over 99% of those who might be accused of paternity, regardless of the age of the child."). This, of course, can only be true where such scientific evidence is available. However, in cases where the State offers no scientific evidence of paternity, undeniably, the long-recognized troubles associated with

establishing paternity still exist. Recognizing that scientific evidence is not always at the fingertips of those who seek to establish or deny paternity, South Dakota's statute should not be considered violative of the Equal Protection Clause merely because of the advancement of science in general if the actual practice in South Dakota does not partake of that progress.[10]

Interestingly, in 1989 South Dakota deleted that portion of SDCL § 25-8-9 which authorized retroactive application. The State contends that this earlier version of the statute demonstrates that the legislature, at one time, felt that there was little danger of stale or fraudulent litigation if the statute were to be applied retroactively. Mr. Serr suggests this most recent, critical deletion indicates just the opposite: the legislature amended the statute so that it is no longer retroactive for the purpose of encouraging persons to bring timely claims, while memories are fresh and witnesses are available. Again, the record does not provide any insight into this question.

Pursuant to South Dakota law, specifically SDCL § 2-14-21, the South Dakota Supreme Court correctly held that under South Dakota law, SDCL § 25-8-9 will not be applied retroactively unless an express intention otherwise appears. *State v. Serr*, 506 N.W.2d at 423. This holding does not violate any previous holding of this Court. While there may be more of an issue regarding the constitutional caliber of the 1978 version of SDCL § 25-8-9, that question has yet to be addressed to or by the South

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[10] For example, it would be extremely helpful to have some indication on the record as to how many paternity cases in South Dakota actually utilize scientific evidence.

Dakota courts. Until there is such a determination by the South Dakota court, jurisdiction by this Court is not proper.

CONCLUSION

If the State's presently unsupported assertions are true, the day will not be long in coming before it has another opportunity to prepare a proper record and adequately present its equal protection argument to the South Dakota courts. In the meantime, however, the question should not be wrested away from the South Dakota state courts; nor should this Court's resources be expended on an issue that has yet to be weighed for constitutional validity – tested first on alternative grounds – in the state courts. The State's failure to identify and raise appropriate issues of pre-emption and constitutional merit should not now be construed in its favor so that the South Dakota state courts have no opportunity to test the merit of the claims in the first instance.

For all of the foregoing reasons, the Respondent respectfully requests that this Court deny the State of South Dakota's petition for writ of certiorari.

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No. 93-1091

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FEB 10 1994

OFFICE OF THE CLERK

STATE OF SOUTH DAKOTA, BY AND THROUGH THE DEPARTMENT OF SOCIAL SERVICES EX REL. GAIL A. DOTSON, IN HER OWN BEHALF AND ON BEHALF OF JARED DOTSON, A MINOR CHILD,

Petitioner,

v.

MERYL D. SERR,

Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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INTRODUCTION

This Court held, twenty-two years ago, that

> imposing disabilities on the illegitimate child is contrary to the basic concept of our system that the legal burden should bear some relationship to individual responsibility or wrongdoing.

Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 175 (1972). Accordingly, eleven

years ago in Pickett v. Brown, 462 U.S. 1 (1983), this Court declared a two year statute of limitations on paternity suits to be unconstitutional. A year later, it invalidated a six year statute of limitations on paternity suits. Clark v. Jeter, 486 U.S. 456 (1988).

In 1993, however, the South Dakota Supreme Court upheld a two year statute of limitations on paternity suits. State v. Serr, 506 N.W.2d 421 (S.D. 1993). It is this fundamental inconsistency of state decisional law with federal decisional law which the state seeks to remedy here. Respondent makes a fleeting (and unpersuasive) effort to justify the decision of the State Supreme Court on the merits. His main attack on this Court's consideration of this case, however, was that the federal question was not properly raised or considered below. This argument fails, however, upon an examination of what actually occurred in this case, and upon a

more complete examination of the case law cited by Respondent himself, along with additional case law.

Finally, Mr. Serr, who does not here deny his paternity, see R.B. 6-8, contends that imposing this particular disability on his child, or other illegitimate children, does not present an important federal question. See R.B. 17-19.

I

THE QUESTION PRESENTED WAS CONSIDERED BELOW.

Respondent appears to assert that because the terms of the "Question Presented" to the South Dakota Supreme Court did not reference the unconstitutionality of the two year statute of limitations on paternity, the question simply was not adequately raised or decided. See R.B. 12-13.

That is not, of course, the law. In Sweringen v. St. Louis, 185 U.S. 38, 45-46 (1902), this Court said

> We do not hold it was necessary to plead the claim in order to show it was specially set up, but it must have been so referred to and mentioned as to show that it was present in the minds of the parties claiming the right, or must have been in some way presented to the court.

Similarly, in New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928), this Court said:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.

See also Cissna v. Tennessee, 246 U.S. 289, 293-294 (1918); Yazoo and Mississippi Valley Railroad Co. v. Adams, 180 U.S. 1, 15 (1901).

The record in this case shows that the South Dakota Supreme Court did, in fact, consider and answer the question. The issue

was appropriately raised in the State's Supreme Court brief in a long passage which the Respondent has assiduously ignored. The State argued:

> In the case of Clark v Jetter, [sic] 486 U.S. 456 (1988), our Supreme Court was asked to determine the constitutionality of Pennsylvania's six-year statute of limitations on paternity actions.

Appellee's Brief, Appendix A-110. A factual description follows. The State then commented:

> In examining Clark's Equal Protection argument, Jetter [sic] applied an intermediate scrutiny standard on the discriminatory classification of illegitimacy. Id. at 461. In applying this standard in the context of paternity actions, the Court recognized that in the case of Mills v. Habluetzel, 456 U.S., 91 (1982), it established the following framework.

Appellee's Brief, Appendix A-111.

The State then examined the argument which the Respondent insists is not part of this case. The State said:

> Serr argues that the 1978 version of SDCL 25-8-9 should apply because the state and its citizenry need to be protected from, 'the burden of litigating state [sic] claims.' (Serr brief p. 9.) Speaking on this issue, Jetter [sic] held Pennsylvania's six-year statute of limitations unconstitutional and stated, '[w]e are, however, confident that the six-year statute of limitations is not substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims.' Id. at 464.

Appellee's Brief, Appendix A-112.

The State's brief pointed out that there were other circumstances in which the state of Pennsylvania allowed paternity actions to be litigated after more than six years. Appellee's Brief, Appendix A-112. The State then compared Pennsylvania's statute to the South Dakota statute in a footnote:

> Similarly, South Dakota statutes in 1978 also allowed an action to be brought after six years, if paternity had 'been acknowledged by the father in writing or by the furnishing of support.' SDCL 25-8-9 (June 6, 1978).

Appellee's Brief, Appendix A-113 n.1.

Thus, the state of South Dakota in essence rejected Serr's argument that the 1978 version of SDCL 25-8-9 should apply on the grounds that it was unconstitutional. In association with rejecting this claim, the state cited and analyzed Clark v. Jeter, 486 U.S. 456 (1988), Mills v. Habluetzel, 456 U.S. 91 (1982), and also Pickett v. Brown, which the State described as striking down "Tennessee's two year statute." Appellee's Brief, Appendix A-114.

The issue was certainly adequately raised before the state Supreme Court. Did, then, the South Dakota Supreme Court decide the question? The court's decision first set out the statute in effect in 1978. State v. Serr, 506 N.W.2d 421, 422 (S.D. 1993); Appendix A-5. It stated further:

> Serr contended that under the facts of this case a cause of action for paternity became barred in June 1980.

Id. The state Supreme Court also drew specific attention to the holding of the trial court as follows:

> Also, the trial court held that '[t]he statute of limitations is not applicable to [Serr] as an affirmative defense.'

State v. Serr, 506 N.W.2d at 423; Appendix at A-7. (Brackets in original.)

The decision again drew specific attention to the statute of limitations as in effect in 1978. The Court said:

> Serr contends that the statute of limitations found in SDCL 25-8-9, as it existed in 1978, controls and barred any action for paternity and support after June 6, 1980.

Id. Further, the state Supreme Court stated:

> Dotson did not specifically raise any constitutional issues on her own behalf. However, her brief discussed several U.S. Supreme Court decisions concerning Equal Protection and paternity/statute of limitation issues, all of which have been distinguished by this writing and our reliance upon and discussion in Hove.

State v. Serr, 506 N.W.2d at 423 n.*; Appendix A-9 n.1 (emphasis added).

The state Supreme Court's comment that Dotson (i.e. the State) did "not specifically raise any constitutional issues on her own behalf," id., simply constitutes a recognition by the state Supreme Court that the State did raise constitutional issues in response to the argument made Mr. Serr. The remainder of the quotation simply confirms that state court considered and rejected the constitutional argument made on the basis of the cases cited by the State, i.e. Pickett, Mills and Clark, with regard to the two year statute of limitations. According to the state Supreme Court, "[a]ll" of this Court's decisions "concerning Equal Protection and paternity/ statute of limitations issues," id., cited by the State were distinguishable.

Mr. Serr, in addition, has failed to make any reference to the two dissents in this

case, both of which held the two year statute of limitations on paternity suits unconstitutional. Justice Wuest, in dissent, found that the "South Dakota statute of limitations failed the intermediate scrutiny test and violates the Equal Protection Clause of the Fourteenth Amendment." State v. Serr, 506 N.W.2d at 423; Appendix A-11 (Wuest, J. dissenting).

Justice Sabers, also in dissent, found that:

> As clearly outlined in Pickett . . . (two year statute of limitations unconstitutional) SDCL 25-8-9 was unconstitutional at all times prior to 1986 because it violated the Equal Protection Clause of the Fourteenth Amendment.

State v. Serr, 506 N.W.2d at 425; Appendix A-18 (Sabers, J., dissenting).

It is also worth noting that at least one of the state's lower courts has come to the conclusion that the State v. Serr decision has foreclosed further examination of whether the

1978 statute of limitations is unconstitutional. In a case which has just come to the attention of this office, Weegar and Aurnger v. Bakeberg, (Civ. 92-2769) (Second Judicial Circuit) a maternal grandmother of Cassie Lane Kenyon sought a determination of the paternity of this 14-year-old. The putative father moved to dismiss on the grounds that the 1978 statute of limitations had run. The attorneys for the child argued that the two year statute of limitations was unconstitutional stating:

> In 1979, when Cassie Lane Kenyon was born, SDCL 25-8-5 allowed only two (2) years for the parent of an illegitimate child to seek establishment of the child's paternity and child support. In 1983, the U.S. Supreme Court declared that a two (2) year statute of limitations in paternity cases violated the Equal Protection Clause of the United States Constitution. Pickett v. Brown, 462 U.S. 1. . . . This declaration made two year statutes of limitations void and not enforceable.

Weegar and Aurnger v. Bakeberg, (Brief Regarding Constitutionality of SDCL 25-8-5) at 1.

Lawyers for the child also cited Clark v. Jeter, 486 U.S. 456 (1988), for the proposition that SDCL 25-8-9 was unconstitutional. Id. at 2.

The circuit court, however, granted the dismissal. According to a brief letter opinion:

> Dear Counsel: The defendant has filed a motion to dismiss the proceedings because of the statute of limitations provided in SDCL 25-8-9. Upon review of the recent South Dakota Supreme Court decisions of State of South Dakota, ex rel Dotson v. Serr (opinion filed October 6, 1993) and State of Minnesota, ex rel Hove v. Doese (opinion filed June 9, 1993), this Court finds the defendant's motion meritorious. Both decisions have held that once an action has been barred by the statute of limitations, it cannot be revived by subsequent legislation. The Supreme Court in those decisions has not found the statute unconstitutional.
>
> Mr. Farrell should draft an Order dismissing the plaintiff's claim.

Letter of Circuit Judge Meierhenry, December 1, 1993.

Thus, State v. Serr was cited for the proposition that the two year statute of limitations was essentially unreviewable with regard to constitutional attacks.[1]

In sum, the State in its brief in the state Supreme Court argued the constitutionality of the 1978 statute of limitations. The state Supreme Court, on review, noted the reliance of Mr. Serr on that very statute. Critically, it drew attention to the brief of the state concerning this Court's decisions "concerning Equal Protection and paternity/ statute of limitations issues" and indicated that "all . . . have been distinguished by this writing and our reliance upon discussion in Hove." State v. Serr, 506 N.W.2d at 423 n.*; Appendix A-9 n.1. Taking the Supreme Court's decision at face value, it considered

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[1]The state has been informed that this case is being appealed to the South Dakota Supreme Court.

and rejected the arguments made by the state with regard to the two year statute of limitations. Further, two of the Justices of the Supreme Court in dissent did find the two year statute of limitations as it existed in 1978 to be unconstitutional. Finally, it now appears clear that the state's circuit courts regard the Serr case as binding on the issue of whether the two year statute is constitutional.

The argument that the South Dakota Supreme Court did not consider the issue now presented to this Court is accordingly without merit.[2]

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[2]Webb v. Webb, 451 U.S. 493 (1981), which is relied on so heavily by Respondent, is easily distinguishable. In Webb, the state Supreme Court had not even "mentioned" the federal question nor had it been "mentioned by the dissenting opinion." Webb, 451 U.S. at 495. Further, the Petitioner had not, in the state Supreme Court, cited to the federal constitution or cases interpreting the Full Faith and Credit Clause said to be at issue in Webb. Here, of course, the state set out the argument and federal case authority, including

II

A TWO YEAR STATUTE OF LIMITATIONS ON PATERNITY ACTIONS MAY NOT CONSTITUTIONALLY BE APPLIED TO SHIELD THE PUTATIVE FATHER FROM SUIT CONSISTENT WITH THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION.

Mr. Serr makes little serious effort to evade the direct holdings of Mills v. Habluetzel, 456 U.S. 91 (1982); Pickett v. Brown, 462 U.S. 1 (1983); and Clark v. Jeter, 486 U.S. 456 (1988), which invalidated one, two and six year statutes of limitations on paternity actions. He mainly repeats his claim that the issue had not been considered by the state Supreme Court and argues that the state Supreme Court had considered only the issue of retroactive application of the

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Mills, Pickett, and Clark, but the argument and cases were deemed distinguishable by three members of the court. The two dissenting members of the court, in contrast to those in Webb, specifically reached the question and would have decided it adversely to the Respondent.

statute of limitations. Respondent's Brief, p. 19 et seq.

Respondent thus simply compounds his other errors. An issue may indeed arise as to whether a new statute of limitations may revive an expired cause of action. This issue should not arise, however, if the statute of limitation which has allegedly run was unconstitutional in the first place. As Justice Sabers stated in his dissent in State v. Serr, 506 N.W.2d at 425; Appendix A-19 (Sabers, J., dissenting):

> Therefore, as in Pickett and Clark, because the statute at issue was unconstitutional, it is not, nor was it ever, available to the defendant as an affirmative defense.

Justice Sabers also stated on the footnote to the text above:

> Absent the statute, the child is on equal footing with legitimate children, and Dotson would have until the child reached the age of eighteen to establish paternity and seek child support.

State v. Serr, 506 N.W.2d at 425 n.2; Appendix A-19 n.3.

Thus the retroactivity issue which Mr. Serr brought to the attention of the South Dakota Supreme Court is actually of little relevance if, as the state argues, the two year statute of limitations which is relied upon is itself unconstitutional.

Mr. Serr also quibbles over the number of children who could be harmed by the upholding of the two year statute of limitations. He does not, it should be noted, suggest any reason to doubt the validity of statistics from annual reports authored by the "South Dakota Department of Health, Vital Records Program." Nor can he offer any support for his outlandish suggestion that "it is possible that all of the approximately 8,600 children so generally referred to have established paternity." Respondent's Brief 18. Evidence before this Court does establish that at least

two children have been unable to establish paternity: Jared Dotson, whose case is at issue here and Cassie Lane Kenyon who has been refused an opportunity to prove the paternity of her alleged father on the basis of Serr.

CONCLUSIONS

The State of South Dakota thus respectfully requests that this Court grant the Petition for Writ of Certiorari, vacate the decision below, and remand to the South Dakota Supreme Court for reconsideration in light of Mills, Pickett and Clark.

Respectfully submitted,

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